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IN THE
Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Six federal rules of procedure incorporate an "excusable neglect" standard that governs whether a missed deadline should be excused. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities, *id.* at 389, 392, explaining that the factors to be considered include "[1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 395. The Court likewise made clear that a party seeking relief need not make a threshold showing of blamelessness, for that would read the word "excusable" out of the phrase "excusable neglect." *Id.* at 395 & n.14.

Although *Pioneer* resolved some of the confusion evinced by lower courts in applying the "excusable neglect" standard, mature and deep conflicts involving nearly all of the circuits have arisen as to two issues presented that are ripe for decision by this Court:

1. Whether a 5-3 circuit conflict (with an additional circuit on both sides) should be resolved as to whether prejudice may be shown merely because a party no longer has to litigate and thereby receives a windfall from the strict enforcement of a deadline without any diminution in its ability to defend the case on the merits.

2. Whether a 5-4 circuit conflict should be resolved as to whether a district court may decline to give any weight to reliance on the normal time for delivery of mail and instead place the risk of late delivery by the postal service entirely on the mailer.

PARTIES TO THE PROCEEDINGS

Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Abbott Laboratories and Geneva Pharmaceuticals, Inc. were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

Respondents The Trustees of the Correction Officers Benevolent Association Security Benefits Fund-Retirees, Corrections Officers Benevolent Association Security Benefits Funds Active, Trustees of the Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority were appellants in the court of appeals proceedings but were the plaintiffs in a separate action initiated in New York that, as part of a multi-district litigation case in Florida federal district court, was consolidated with, *inter alia*, the action initiated in Illinois by the petitioners in this case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company state the following:

Blue Cross and Blue Shield of Florida, Inc. is a Florida not-for-profit mutual insurance company, and its wholly owned subsidiary, Health Options, Inc., is a Florida corporation. Blue Cross and Blue Shield of Florida has no parent corporation and does not issue stock.

BCBSM, Inc., doing business as Blue Cross Blue Shield of Minnesota, is a Minnesota not-for-profit health services plan corporation. Its wholly owned subsidiaries are: Comprehensive Care Services, Inc., a Minnesota for-profit company; First Plan of Minnesota and HMO Minnesota, Minnesota not-for-profit corporations; and Atrium Health Plan, Inc., a now-dissolved Wisconsin not-for-profit corporation whose assets were sold in 2005, the same year it was dissolved (BCBSM, Inc. remains the successor-in-interest to Atrium Health Plan, Inc., however). Blue Cross Blue Shield of Minnesota is a subsidiary of Aware Integrated, Inc., and no publicly held corporation owns 10% or more of its stock.

The following entities are subsidiaries or affiliates of BCBSM, Inc.:

ADVANCE INSURANCE COMPANY OF KANSAS (AICK)

Affiliated Community Health Network, Inc. (ACHN)

Aware Dental Services, LLC.

AWARE INTEGRATED, INC. (AII)*

BCBSM, INC., dba Blue Cross and Blue Shield of Minnesota (BCBSM)*

BCBSM FOUNDATION, INC., dba Blue Cross and Blue Shield of Minnesota Foundation*

SupportSource, Inc.

Capital Asset Care, Inc., dba Capital Asset Care (CAC)

Care Delivery Management, Inc. (CDMI)*

Comprehensive Care Services, Inc. (CCS)*

Comprehensive Managed Care, Inc., dba Comprehensive Managed Care (CMC)

Employer Provider Network, Inc. (EPNI)

First Plan of Minnesota*

HMO MINNESOTA, dba Blue Plus*

MII, Inc.

MII LIFE, INCORPORATED**

MII Services, Inc., dba ClearConnect

Minnesota Institute of Public Health (MIPH)

Pharmacy Gold, Inc. (PGI)

Prime Therapeutics, Inc. (PTI)

Prime Therapeutics, LLC (Prime LLC)

River Bend Community Health Network, Inc., dba RiverPath Community Health Network*

* Licensee of the Blue Cross and Blue Shield Association.

** Licensee of the Blue Cross and Blue Shield Association (for life products only).

BlueCross BlueShield of Tennessee is a Tennessee not-for-profit corporation, and its wholly owned subsidiaries, Volunteer State Health Plan, Inc., is a Tennessee not-for-profit corporation. Blue Cross Blue Shield of Tennessee also wholly owned another subsidiary, Tennessee Health Care Network, during the spring 2004 opt-out timeframe. Tennessee Health Care Network was formerly a Tennessee not-for-profit corporation. It was dissolved later in 2004, however. Blue Cross Blue Shield of Tennessee has no parent corporation, and no publicly held corporation owns 10% or more its stock.

CareFirst, Inc. is a Maryland not-for-profit corporation, with the following wholly owned subsidiaries: CareFirst of Maryland, Inc. is a Maryland not-for-profit corpo-

ration; Willse & Associates, Inc. is a Maryland corporation; CFS Health Group, Inc. is a Maryland corporation; Patuxent Medical Group, Inc. is a Maryland corporation; Group Hospitalization and Medical Services, Inc. is a not-for-profit company created under federal charter; Capital Care, Inc. is a District of Columbia corporation; Capital Area Services, Inc. is a West Virginia corporation; and Blue Cross Blue Shield of Delaware, Inc. is a Delaware not-for-profit corporation. CareFirst, Inc. has no parent corporation, and no publicly held corporation owns 10% or more its stock.

Federated Mutual Insurance Company is a Minnesota corporation. Federated Mutual Insurance Company has several wholly owned subsidiaries, but none is a publicly traded company. Federated Mutual Insurance Company is a mutual company (it is owned by the policyholders) and has no publicly traded stock.

Health Care Service Corporation is an Illinois Mutual Legal Reserve Company, which includes its Illinois, New Mexico, and Texas Divisions. Health Care Service Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Mutual of Omaha Insurance Company is a Nebraska mutual company with the following wholly owned subsidiaries: United of Omaha Life Insurance Company, United World Life Insurance Company, Exclusive/Healthcare, Inc., Omaha Property and Casualty Company, and innowave, Inc. Mutual of Omaha Insurance Company has no parent corporation. Because Mutual of Omaha Insurance Company is a mutual company, it is owned by its policy owners. Accordingly, it has issued no capital stock and there are no shareholders. Consequently, there is no capital stock owned by any publicly held corporation or any other person.

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Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's per curiam memorandum opinion (Pet. App. 1a-2a) is unreported (available at 2006 WL 1159646). The district court's order (Pet. App. 3a-15a) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 3, 2006. A timely petition for rehearing was denied on June 7, 2006. *See* Pet. App. 16a. On August 28, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 5, 2006. *See id.* at 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 6(b) is at Pet. App. 64a.

INTRODUCTION

This case raises issues of recurring significance to the fair and efficient administration of litigation in the federal courts: what factors must district courts consider in granting relief from a filing deemed to be tardy under the "excusable neglect" standard set forth in six federal rules of procedure. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities. *Id.* at 389, 392. The factors to be considered include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the

movant, and [4] whether the movant acted in good faith." *Id.* at 395.

Petitioners are seven large health insurers that sought to opt out of an insufficient class-action settlement reached between plaintiffs' class counsel and respondents Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva"). Class plaintiffs alleged antitrust violations from Abbott's written agreement to pay Geneva $4.5 million per month in exchange for Geneva's agreement not to market its FDA-approved generic drug in competition with Abbott's brand name drug. Petitioners were required to send their opt-out notices "by first-class mail in time to be received no later than April 11, 2005," Pet. App. 48a, thus precluding use of a more reliable delivery service and requiring opt-out notices to be sent in time to be received (as opposed to postmarked) by a date certain. Petitioners – which had already been litigating their own non-class claims against respondents in state court for nearly two years – mailed their opt-out notices four days before the due date, but they arrived a few days late. The district court refused to find excusable neglect, and the Eleventh Circuit summarily affirmed.

In applying *Pioneer*, the Eleventh Circuit deepened two substantial conflicts in the courts of appeals. The first concerns what constitutes prejudice to the non-movant by excusing strict compliance with a deadline. The court below found that mere exposure to litigation by petitioners was cognizable prejudice. According to the Eleventh Circuit and two others, loss of the potential windfall a party would have received had the deadline been enforced always constitutes significant prejudice. As five other circuits have held, however, the prejudice analysis properly focuses only on whether excusing compliance with the deadline will cause the non-movant to lose something it would have had if the filing were timely – for example, loss of evidence or access to witnesses, or missing an important deadline – but not facing the same litigation a defendant would have faced but for an untimely filing. The

current articulation of the meaning of prejudice in three circuits thus deviates substantially from the meaning given to that term by five other circuits. Courts regularly assess what constitutes prejudice under the "excusable neglect" standard, and this Court's guidance is needed on that important and recurring issue.

The second conflict concerns whether a district court may decline to give any weight to reliance on the fact that mail typically arrives in the normal course in approximately three days and instead place the risk of late delivery entirely on the mailer. The court below affirmed the district court's holding that petitioners had "assumed the risk" their notices would not arrive on time. Pet. App. 2a, 6a. While that holding is in accord with the law in four other circuits, another four circuits clearly hold that weight should be given to reliance on the fact that mail typically arrives in three days. Indeed, Federal Rule of Civil Procedure 6(e), which adds three days to the response period when a pleading is served by mail, incorporates that same assumption. Although the second question may seem mundane, that is precisely why it is important: reliance on the normal course of mail delivery has enormous practical significance to the day-to-day practice of law. More generally, the erection of a *per se* rule that always visits the vagaries of mail delivery on the mailer who relies on the normal time for delivery exhibits confusion in the lower courts over how to apply *Pioneer*, which plainly held that courts may not merely find "neglect," i.e., a lack of complete diligence, and then deny relief. Rather, even assuming the movant acted with some degree of "neglect" or carelessness, courts must nevertheless conduct a careful, equitable analysis to determine whether it is "excusable."

STATEMENT OF THE CASE

1. Petitioners are seven health insurers that purchased millions of dollars worth of Abbott's brand-name pioneer drug, Hytrin, at prices that were supracompetitive due to respondents' agreement not to compete with each other.

Hytrin's active ingredient is terazosin hydrochloride ("terazosin HCL"), which is used to treat high blood pressure and enlarged prostate – chronic conditions affecting senior citizens and others. Since its introduction in 1987, Hytrin has been one of Abbott's "most important products," a blockbuster drug generating $542 million in U.S. sales in 1998 alone – more than 20% of Abbott's net domestic pharmaceutical product revenues.[1]

Generic drug makers seeking to compete must certify to the Food and Drug Administration ("FDA") that the pioneer drug's (unexpired) patents are either invalid or will not be infringed by the generic. *See* 21 U.S.C. § 355(j). If the pioneer files suit alleging infringement within 45 days, however, then the FDA may not approve the generic for 30 months (unless the generic maker prevails in the litigation in less time). *See id.* The maker of a pioneer drug commonly seeks "add-on" patents, which can "be used as a blockade by the brand-name drug manufacturer to delay generic competition." *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 677 (S.D. Fla. 2004). Even after its primary patents on Hytrin had expired by late 1995, Abbott sought to maintain its patent monopoly through additional patents. *See id.*

Between 1993 and 1996, respondent Geneva filed multiple FDA applications to market generic versions of Hytrin, and Abbott filed multiple patent infringement suits against Geneva. On March 30, 1998, the FDA granted Geneva final approval to market a generic competitor to Hytrin, but Geneva agreed two days later not to compete with Abbott. The FTC investigated the deal and subsequently reached a consent decree with Abbott.[2]

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[1] *See* Compl. ¶ 14, *In re Abbott Labs. and Geneva Pharms., Inc.*, Docket No. C-3945 (FTC filed May 22, 2000) ("FTC Compl."), *available at* www.ftc.gov/os/2000/05/abbottgenevacomp.htm.

[2] *See* Decision and Order, *In re Abbott Labs.*, Docket No. C-3945 (FTC May 22, 2000), *available at* www.ftc.gov/os/2000/05/c3945.do.htm.

According to the FTC, Geneva contacted Abbott on the same day it received FDA approval and announced that it would begin competing against Hytrin unless Abbott paid it not to do so. *See* FTC Compl. ¶ 24. Abbott had a substantial economic incentive to agree, having "forecasted that entry of generic terazosin HCL on April 1, 1998 would have eliminated over $185 million in Hytrin sales in just six months." *Id.* Accordingly, while "Abbott estimated Geneva's revenues from launching generic terazosin HCL at $1 million to $1.5 million per month," Abbott "was willing to pay Geneva a 'premium' over that not to compete." *Id.* ¶ 25. That "premium" amounted to more than 300% of Geneva's expected revenues. Under respondents' April 1, 1998 agreement, Abbott agreed to pay $4.5 million per month for Geneva's agreement not to market its FDA-approved generic until either Geneva prevailed in Abbott's infringement suits or another generic Hytrin competitor entered the market. *See id.* ¶¶ 26-27.

For its part, Geneva entered the agreement despite the fact that, "[b]y early 1998, Geneva, including particularly its CEO, was confident that it ultimately would prevail in its patent infringement dispute with Abbott." *Id.* ¶ 20. (Geneva ultimately did prevail.[3]) "In the words of Geneva's CEO at the time the Agreement was signed, this Agreement represented to Geneva the 'best of all worlds,' because Geneva obtained a risk-free 'monetary settlement on an ongoing basis until the litigation was resolved' and still could market its product exclusively for 180 days after the litigation was over." *Id.* ¶ 29.[4]

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[3] *See Abbott Labs. v. Geneva Pharms., Inc.*, Nos. 96-C-3331 *et al.*, 1998 WL 566884 (N.D. Ill. Sept. 1, 1998) (Abbott patent held invalid), *aff'd*, 182 F.3d 1315 (Fed. Cir. 1999).

[4] The first successful generic applicant gets a 180-period of exclusivity during which the FDA may not approve another generic competitor to the pioneer drug. *See* FTC Compl. ¶ 9 (citing 21 U.S.C. § 355). But the 180-day period "does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents [on the pioneer drug] are invalid or not infringed." *Id.*

Although a "win-win" agreement for respondents, the FTC determined that Hytrin purchasers "were deprived of the benefits of new competition from Geneva and other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others were forced to purchase Abbott's more expensive Hytrin product." *Id.* ¶ 35. Furthermore, "[a] generic product can quickly and efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year," and "Abbott's forecasts projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months alone." *Id.* ¶ 36. Respondents' agreement, however, precluded such fast-acting consumer benefits through competition from Geneva. In addition, another generic manufacturer that had satisfied the FDA's requirements for approval by February 1999 "was barred from entering the market because Geneva's 180-day Exclusivity Period had not begun to run." *Id.* ¶ 38. The FTC's investigation led Abbott and Geneva to terminate their agreement early, and Geneva entered the market in August 1999 (followed by others more than 180 days later). By April 2000, the "generic average wholesale price" was "less than 16% of Abbott's Hytrin price." *Terazosin*, 220 F.R.D. at 677-78.

2. Numerous antitrust class actions seeking damages from respondents were filed in (or removed to) the federal courts, which the Judicial Panel on Multidistrict Litigation consolidated in January 2000 in the district court below. The district court granted plaintiffs partial summary judgment in holding that the agreement was a *per se* violation of § 1 of the Sherman Act, but on appeal the Eleventh Circuit reversed and remanded for the district court to perform a more nuanced analysis of the agreement. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1311 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004), *on remand*, *In re Terazosin Hydrochloride Anti-*

trust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (again finding *per se* violation of Sherman Act). The district court also certified direct purchaser classes, but the Eleventh Circuit reversed that decision due to apparent intra-class conflicts. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181 (11th Cir. 2003).

Meanwhile, petitioners (together with eight other non-petitioner insurers, collectively referred to below as the "Illinois TPPs," meaning "third-party payers," *see* Pet. App. 4a) separately filed suit against respondents in Illinois state court, alleging violations of state antitrust and unjust enrichment laws. *See id.* at 4a-5a (citing *BCBSM, Inc., et al. v. Abbott Labs., et al.*, No. 03L-009743 (Cook Cty., Ill. Cir. Ct. filed Aug. 12, 2003)). Unlike federal antitrust law, those state laws permit antitrust actions by indirect purchasers like petitioners, which purchased Hytrin from intermediaries such as pharmacies.[5] Petitioners alleged both that respondents' April 1998 agreement was unlawful and that Abbott had delayed entry of generic competition from the market as early as 1996 by instituting sham patent suits. By mid-2005, the Illinois TPPs and respondents were preparing summary judgment briefs in state court. *See* Dist. Ct. 6/28/05 Tr. 51.

While petitioners' Illinois action was proceeding ahead, the district court in 2004 certified 17 state classes of indirect purchaser plaintiffs, which included petitioners and the eight other Illinois TPPs. *See Terazosin*, 220 F.R.D. at 675. Respondents appealed, claiming intra-class conflicts in that end users of Hytrin would prefer a finding that all damages were passed through to them via higher insurance premiums, while the insurers would prefer a finding

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[5] *Compare Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (no antitrust standing for indirect purchasers under federal antitrust laws), *with California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989) (no preemption of state indirect purchaser statutes by *Illinois Brick*).

that they passed on no such damages.[6] Petitioners' non-class action in Illinois, on the other hand, presented no such certification problems.

3. Faced with the possibility of a third court of appeals reversal, class counsel for plaintiffs reached a settlement with respondents covering the indirect purchaser classes, which the district court preliminarily approved on March 7, 2005. After deducting attorneys' fees, the allocation for all TPPs was less than $15 million – an amount representing less than one month's worth of Abbott's alleged illegal Hytrin profits. *See* Appellants' Br. 9-10 (Sept. 20, 2005). In contrast, petitioners' 1998-99 expenditures on Hytrin reflect recoverable damages in excess of $16 million, before trebling. *See id.* at 15 n.7. Thus, if petitioners were required to share in the proceeds of the class settlement, they would receive a tiny fraction of what they stood to gain in their ongoing Illinois litigation.[7]

Class-action settlements commonly incorporate a so-called "blow provision," which permits the settling defendants to rescind (or "blow") the settlement in the event that opt-out claims exceed a certain threshold. Blow provisions thus minimize the risk that settling defendants will be required both to pay the settlement monies yet nevertheless face substantial liabilities to opt-outs whose claims the negotiated settlement amount was intended to

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[6] Respondents also claimed that Illinois and New York law prohibit indirect purchaser class certifications. *See, e.g.*, 740 Ill. Comp. Stat. 10/7(2); *Asher v. Abbott Labs.*, 737 N.Y.S.2d 4, 4 (App. Div. 2002).

[7] Plaintiffs' expert opined that indirect purchaser class damages "could amount to as much as $141 million," while the gross settlement payable by respondents came to 19% of that amount, or $28.7 million. Indirect Purchaser Plaintiff Classes' Motion for Final Approval at 17-18 (June 15, 2006) ("IPP Final Approval Mot."). Plaintiffs' class counsel sought to justify the reduced amount of the settlement: "[I]f the IPP cases did not settle and the Eleventh Circuit reversed the Class Certification Order, the value of the IPP cases would have been greatly diminished." *Id.* at 16.

extinguish.[8] The settlement agreement here likewise included a blow provision (which was originally filed under seal but later unsealed while the case was on appeal) under which respondents could rescind the settlement if there were excessive opt-outs.

The blow provision here, however, expressly *excluded* any Illinois TPP opt-outs from counting toward the blow threshold, thus *precluding* respondents from rescinding the settlement based on petitioners' opt-outs.[9] Plainly, if the negotiated settlement amount had included monies allocated to the Illinois TPPs' "significant claims,"[10] then respondents would not have agreed to exclude those opt-outs from the blow threshold and risk paying the settlement monies allocated to those claims, yet still face liability on those same claims in the Illinois case. This point was made explicitly by plaintiffs' class counsel[11] and implicitly by Abbott's counsel.[12] Likewise, in urging the fil-

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[8] *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 365-66 (S.D.N.Y.), *aff'd*, Nos. 95-9209 *et al.*, 1996 WL 739258 (2d Cir. Dec. 27, 1996) (judgment noted at 107 F.3d 3).

[9] *See* Pet. App. 20a (opt-out threshold calculated by "excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out").

[10] IPP Final Approval Mot. at 25 ("[Illinois TPPs] are virtually the only TPP opt-outs with potentially significant claims.").

[11] *See* IPP Final Approval Mot. at 3 ("The anticipated exclusion of the Illinois Case TPPs . . . from the IPP classes was factored into the settlement negotiations, including the amount of the Proposed Settlement and the conditions for termination of the Proposed Settlement by Defendants."); *id.* at 25 ("The[] [Illinois TPPs'] exclusion from the settlement was anticipated by Class Counsel and was factored into the negotiations of the settlement amount."); *id.*, Ex. 3, Decl. of Class Counsel Geoffrey M. Horn ¶ 34 ("Another factor plaintiffs considered during settlement negotiations was the value of claims similar to the classes' claims brought by a group of individual TPPs in Illinois state court ('the Illinois TPPs'). I personally spent a great deal of time trying to determine the value of the absence of the Illinois Case TPPs from any potential settlement of [this] action.").

[12] Dist. Ct. 6/28/05 Tr. 188 (counsel for Abbott: "it was perfectly possible the [Illinois TPPs] were opting out" due to their "strong interest

ing of the settlement agreement, the district court voiced its expectation that the Illinois TPPs would opt out.[13]

4. Because the blow provision was filed under seal (as "Rider A") by respondents and plaintiffs' class counsel, petitioners did not know that their opt-outs would not count toward the blow provision threshold. The settlement agreement itself, however, stated that a blow provision existed and that the deadline for respondents to exercise any rights under it was May 9, 2005, or 28 days after petitioners' opt-out notices were due on April 11, 2005.[14]

The TPP opt-out form required that TPPs must "send it by first-class mail in time to be received no later than April 11, 2005." Pet. App. 48a.[15] Petitioners were thus required to send their opt-out notices via a specific mode of delivery (first-class mail) rather than a private mail carrier or overnight mail; and the deadline was not a postmark date but an instruction to "send it" enough in advance so that it could be "received no later than April 11, 2005," *id.* – possibly exposing would-be opt-outs to the vagaries of first-class mail delivery.

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in pushing ahead" in Illinois); Dist. Ct. 6/29/05 Tr. 97 (counsel for Abbott: "we agreed to have a settlement with these [indirect purchaser] classes and to see what happened with the opt-out, but we weren't requiring [the Illinois TPPs] to be a participant in the settlement").

[13] *See, e.g.*, Dist. Ct. 2/4/05 Tr. 35 ("so that [counsel for the Illinois TPPs] can exercise his opt out rights and proceed with his trial, we need to get the notice out").

[14] *See* Settlement Agreement at 19 ("To terminate this Settlement Agreement on the basis that the Third Party Payer Threshold Amount (as that term is defined in Rider A) has been exceeded, Defendants shall provide written notice (which may be by facsimile or electronic mail) to IPPs' Co-Lead Counsel by 5:00 p.m. Pacific time on May 9, 2005.") (attached as Exhibit 1 to Indirect Purchaser Plaintiff Classes' and Plaintiff States' Motion for Preliminary Approval of Settlement Agreement (Mar. 3, 2005)).

[15] By comparison, the "Proof of Claim" used to claim a distribution from the settlement fund only had to be "*postmarked* by July 15, 2005." Pet. App. 52a (emphasis added).

The TPP opt-out form also required a "separate notice of exclusion" for each TPP, along with that party's address and taxpayer identification number, or EIN. For petitioners, this meant compiling thousands of EINs, since each self-funded employer health plan organized under an insurer must have its own EIN. *See* Dist. Ct. 6/28/05 Tr. 14.

Finally, the opt-out form requested (though did not expressly require) that opt-outs submit a certified breakdown of the "Amounts paid in each of the 18 states for Hytrin® and/or generic terazosin hydrochloride during the period January 1, 1998 to December 31, 1999, based on records maintained by the Class Member." Pet. App. 50a (footnote omitted). The opt-out notice stated this was "for the parties to determine what effect, if any, the Opt-Out's exclusion has on the termination contingencies," i.e., the sealed Rider A blow provision. *Id.* at 46a. An opt-out that failed to provide those requested payment data risked subjecting the objector opting out of the settlement to "discovery via subpoena or other legal process." *Id.*

The opt-out form did *not*, however, reveal that respondents did not even need to know whether any of the Illinois TPPs had opted out in order to determine whether their blow threshold had been reached. Petitioners therefore provided the requested drug purchase data, sifting through millions of individual prescription transactions, all within the 35 days provided by the notice of settlement. *See* Dist. Ct. 6/28/05 Tr. 19.

After compiling the thousands of EINs required by the opt-out form, and the voluminous drug purchase data requested by the form, all 15 of the Illinois TPPs submitted their opt-out materials by first-class mail at the main Washington, D.C. post office at 11:06 p.m. on Thursday, April 7, 2005, four days before the April 11 deadline. Although the 15 packages were mailed together and destined for the same West Palm Beach, Florida post office box, they arrived in staggered fashion over the next four to eight days. Of the seven petitioner opt-outs, two arrived on April 13 (two days late, six days after mailing)

and five arrived on April 15 (four days late, eight days after mailing). Seven of the non-petitioner Illinois TPP opt-outs arrived a few hours after midnight on April 12.[16] The remaining opt-out arrived on time.

5. The district court denied petitioners' motion to excuse the late arrival of their opt-out notices pursuant to the "excusable neglect" standard in Federal Rule of Civil Procedure 6(b)(2), as interpreted by this Court in *Pioneer*. *See supra* pp. 1-2 (setting out *Pioneer* factors). First, the court found that petitioners had "assumed the risk" of a tardy submission by using "regular first class mail instead of an expedited service such as priority mail." Pet. App. 6a. The court rejected petitioners' reliance on the fact that mail typically arrives in the normal course in approximately three days. *See id.* at 7a & n.4.

Second, the court found that "the length of the delay was not substantial," *id.* at 7a-8a, thus necessarily finding that there was no impact at all on judicial administration of the proceedings before it. *See Pioneer*, 507 U.S. at 395 (courts should consider "the length of the delay and its potential impact on judicial proceedings"). Nevertheless, the court found that allowing the late-received opt-outs "would prejudice the Defendants in that they would be required to litigate against entities who inexcusably failed to submit timely opt-out[] forms." Pet. App. 7a-8a. The court thereby found that mere exposure to the ongoing Illinois state court litigation was cognizable prejudice under the excusable neglect standard. The court also found prejudice in that respondents "entered into the IPP settlement in order to achieve a full and complete resolution

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[16] Those seven opt-outs were originally marked timely by the claims administrator and are not at issue here. In fact, they arrived just hours late, at 4:11 a.m. on April 12. Although the claims administrator did not even pick up any mail delivered on April 11 until 6 a.m. the morning of April 12 (when he marked everything in the post office box as having been received the day before), the district court nevertheless refused to find excusable neglect. *See* Order at 2 (Feb. 28, 2006). That holding is now on appeal to the Eleventh Circuit.

of all IPP claims, and the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations." *Id.* at 8a. The court did not identify any prejudice other than having to continue litigating the nearly two-year-old Illinois case.

Finally, the district court adopted the supposition advanced by respondents, unsupported by any evidence, that "the Court could reasonably conclude that the Illinois TPPs waited until the last minute intentionally with the hopes of minimizing the chances that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions." *Id.* The court offered no explanation for how transmitting petitioners' opt-outs to arrive on or about April 11 could have affected respondents' exercise of their blow rights by the settlement agreement's *May 9* deadline (even assuming the Illinois TPP opt-outs counted toward the blow threshold, which they did not).[17]

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[17] The district court's July 8, 2005 opinion also stated that "the Illinois TPPs have offered no evidence to support a finding that they acted in 'good faith.'" Pet. App. 8a. The opinion acknowledged the Illinois TPPs' counsel's argument that the voluminous and detailed opt-out forms were not sent until April 7, 2005, because of "the time and effort that it took to gather all of the documentation" required by the forms. *Id.* at 8a n.6. The opinion stated, however, that "there is no record evidence on that issue" and that, "[f]urther, it appears that much of the documentation that was being gathered was not even necessary for the Illinois TPPs to opt out." *Id.* To address the court's concerns, petitioners had filed a timely reply brief on June 30, 2005. Petitioners noted that "the detailed information requested in the Request for Exclusion, including drug purchase data broken down by year and then further broken down by each of eighteen states," "was the heart of the opt out process" so that respondents could know in time for the May 9 blow deadline whether the Illinois TPP opt-outs triggered the blow threshold. Reply Br. of Illinois Plaintiffs at 5-6 (June 30, 2005). Petitioners' affidavits showed that generating both the required EINs and the requested drug payment data together caused "the Illinois [TPPs] to expend over 1,090 hours of work (140 hours by their data experts and 950 by their counsel) assembling data, EIN's, and preparing the opt-out packages, running over 3,985 pages." *Id.* at 6-7.

6. Petitioners appealed. After briefing but before decision, petitioners learned from plaintiffs' class counsel that the blow provision in Rider A in fact excluded the value of the Illinois TPP opt-outs from the blow threshold. Petitioners sought supplemental briefing on the effect of the blow provision, which the court of appeals denied "without prejudice to [petitioners'] right to file a Fed.R.Civ.P. 60(b) motion in district court." Order (Dec. 29, 2005).[18]

The Eleventh Circuit affirmed the district court's order in a brief, unpublished opinion. After briefly reciting the procedural history of the case, the court stated: "We review the district court's decision for abuse of discretion. After considering the parties [*sic*] briefs and the relevant portions of the record, we find no such abuse." Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's summary affirmance of the district court's decision[19] both fundamentally misapprehends

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At the June 29, 2005 continuation of the fairness hearing, the district court (in the absence of counsel for petitioners) announced that it intended to deny petitioners' motion in a written order to follow. In its July 8, 2005 order, the court denied leave to file petitioners' reply brief "in light of the fact that the Court orally announced its ruling denying the Illinois TPPs' motion for leave to file a late opt-in at the fairness hearing, and the Illinois TPPs fail to provide any authorities or arguments justifying the reversal of the Court's ruling." Pet. App. 14a-15a. Thus, while the court denied leave to file the reply brief, it also actually considered and rejected petitioners' arguments and affidavits.

[18] The district court subsequently ordered the blow provision unsealed. *See* Dist. Ct. Docket Entry 1671 (Feb. 24, 2006).

[19] The court of appeals' summary affirmance of the district court's judgment is no bar to review. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 151 (2004) (reviewing summary affirmance); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) (same); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 607 (1991) (same); *Miller v. Florida*, 482 U.S. 423, 428 (1987) (same). In that event, "one simply ascribes to the court of appeals the rationale employed by the district court." Robert L. Stern, *et al.*, *Supreme Court Practice* 240 (8th ed. 2002); *see id.* at 239-40 ("Of course, a district court decision may be cited and quoted for conflict purposes where the deci-

this Court's teaching in *Pioneer* and exposes conflicting views among the courts of appeals on two questions of law that are critical to judicial administration of six Federal Rules of Civil, Criminal, and Appellate Procedure and the Bankruptcy Rules that incorporate the "excusable neglect" standard.[20]

The first question is whether a settling party experiences any "prejudice" cognizable under the "excusable neglect" standard merely by having to continue to litigate a case that would have been snuffed out by strict application of the opt-out date. A clear majority of circuits has held that a non-movant's windfall from a missed deadline is not cognizable prejudice; rather, to constitute prejudice, the non-movant must be in a worse position if the deadline were excused than if it had been met.

The Eleventh Circuit also deepened a second conflict of recurring significance by holding that a litigant's reliance on the normal course of first-class mail delivery gets no weight in assessing excusable neglect under *Pioneer*'s equitable balancing test. In doing so, the court squarely contravened *Pioneer*'s teaching that the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless. Both issues are of recurring significance to litigants.

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sion has been summarily affirmed, without opinion, by a court of appeals."). "A contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review." *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam).

[20] The "excusable neglect" standard is found in Federal Rules of Civil Procedure 6(b), 13(f), and 60(b); Federal Rule of Criminal Procedure 45(b); Federal Rule of Appellate Procedure 4(a) and (b); and Bankruptcy Rule 9006(b)(1). *See Pioneer*, 507 U.S. at 387 n.3; *see also Stutson*, 516 U.S. at 197-98 (holding that *Pioneer* applies to Federal Rule of Appellate Procedure 4(b)). The lower courts have consistently held that this Court's *Pioneer* analysis applies to all six. *See, e.g., Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 & n.6 (2d Cir. 2003); *Pratt v. Philbrook*, 109 F.3d 18, 19 & nn.1, 2, 3 (1st Cir. 1997).

I. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER A DEFENDANT IS PREJUDICED MERELY BY HAVING TO LITIGATE CLAIMS IT WOULD HAVE FACED BUT FOR A MISSED DEADLINE

A. Respondents Suffer No Cognizable Prejudice From Litigating Claims They Would Have Faced But For A Missed Deadline

Because respondents were defending against claims by petitioners in Illinois state court, the strict enforcement of the opt-out deadline in this case had the effect of giving respondents a windfall: they could assert that, as non-opted-out members of the class, petitioners could not bring the Illinois action. The court below held that respondents therefore suffered "prejudice" under the excusable neglect standard by having to continue to litigate those Illinois claims. By holding that the risk of continuing litigation constitutes cognizable prejudice under the excusable neglect standard, the court applied an erroneous legal rule in conflict with numerous judicial decisions.

Under the expansive reasoning adopted by the Eleventh Circuit, prejudice exists in virtually every case. When a party misses a deadline and loses certain rights, the other parties receive a windfall. It is illogical to consider the loss of that windfall to be an injury, damage, or detriment constituting "prejudice" in any meaningful sense of that word. To "prejudice" another, however, means to cause them injury or detriment – not to remove a fortuitous benefit. *See American Heritage Dictionary* 1428 (3d ed. 1992) ("To affect injuriously or detrimentally by a judgment or an act."); *Webster's Third New International Dictionary* 1788 (2002) ("to injure or damage by some judgment or action"). Prejudice in this context must require that the defendant lost a right or option it would otherwise have had *if the deadline had been met.* For example, genuine prejudice might be found where the delay, if excused, would cause the non-movant to suffer a loss of evidence or access to witnesses, or to miss an important

deadline.[21] In those instances, the non-movant would not be in the same position than if the deadline had been met.

Here, on the other hand, the court identified no loss to respondents of any right they would have had but for the missed deadline, and there is none. Instead, respondents lost only the windfall of not having to defend against petitioners' Illinois claims. The court's unsupported statement that "the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations" adds nothing to its prejudice analysis. Pet. App. 8a. Respondents lost no rights under the settlement agreement that they would have had if petitioners' opt-outs had arrived on time, and neither respondents nor the court below identified any such prejudice.

The court's finding of prejudice here was particularly egregious given that the settlement amount was based, at least to some significant degree, on the expectation that petitioners (as well as the other Illinois TPPs) would opt out. Respondents thus receive a double windfall: not only are they freed of their potential liabilities to petitioners in the Illinois case, but they gain the additional benefit of having terminated the class claims without paying much if anything for the value of petitioners' claims. Other indirect purchaser class members will also suffer because their recovery will be diminished to the extent of petitioners' claims to the settlement fund.[22]

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[21] *See Donald v. Cook Cty. Sheriff's Dep't*, 95 F.3d 548, 557-58 (7th Cir. 1996) (finding prejudice where non-movant plaintiff lost the ability to correct defects in his choice of defendants within the statute of limitations due to defendant's long delay in answering the complaint).

[22] Regardless of what happens here, moreover, respondents will still have to litigate the same claims against the Illinois TPP whose opt-out form, mailed at the same time as petitioners' forms, arrived on time.

B. Federal Courts Are Deeply Divided On Whether Simple Exposure To Litigation Of A Claim Constitutes Cognizable Prejudice Under The Excusable Neglect Standard

1. The Third and Seventh Circuits (and arguably the D.C. Circuit, *see infra* p. 21) are aligned with the Eleventh Circuit's holding that exposure to litigation that a defendant would have faced but for a missed deadline constitutes prejudice under the excusable neglect standard. In *Chrysler Credit Corp. v. Macino*, 710 F.2d 363 (1983), the Seventh Circuit affirmed a district court's refusal to vacate a default judgment pursuant to Rule 60(b). The court reasoned that "reopening the entry of default would have prejudiced Chrysler Credit, the party without fault, by requiring it to devote time and money to additional litigation." *Id.* at 367. Thus, the Seventh Circuit's approach to the issue clearly contemplates that additional litigation, without more, constitutes cognizable prejudice under the excusable neglect standard.

The Third Circuit has also held that simple exposure to claims the non-movant would have faced but for a tardy filing constitutes cognizable prejudice within the meaning of *Pioneer*. In *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (2001), the court found no prejudice in allowing a late proof of claim because the defendant's total liability had been capped and would not be affected by the inclusion of additional class members. *See id.* at 323-24.[23] The court then explained, however, that a case involving "expansion of the plaintiff class" by permitting late-filed claims against an uncapped settlement fund "will be to the detriment of the defendant." *Id.* at 323.

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[23] *See also In re Cendant Corp. PRIDES Litig.*, 233 F.3d 188, 196 (3d Cir. 2000) (no prejudice from late proof of claim where defendant's total liability is capped regardless of the number of claimants); *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 128 (3d Cir. 1999) (no prejudice from creditor's late-filed claim where bankrupt debtor had "already planned to pay" the claim under the express terms of the reorganization plan).

Subsequently, the Third Circuit applied that reasoning squarely to hold that prejudice follows from the loss of a windfall that would have been gained if the tardy filing were not excused. In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 92 F. App'x 890 (2004), the settlement agreement permitted "initial" and "downstream" opt-outs, the difference being that only initial opt-outs could sue for punitive damages. *Id.* at 892. The court affirmed a finding of prejudice and declined to permit a late-filed initial opt-out because doing so would "subject [the defendants] to significantly greater potential damages" and cause them to "lose this benefit of the settlement agreement." *Id.* at 893-94.

Under the approach of the Third, Seventh, and Eleventh Circuits, therefore, mere exposure to litigation a defendant would have faced but for a missed deadline is prejudicial. Although those circuits mandate that prejudice be found in virtually all cases, a clear majority of circuits has rejected that rule.

2. The First, Fourth, Fifth, Ninth, and Tenth Circuits have each held that exposure to litigation and the possible payment of claims that the non-movant would have faced but for an untimely filing is not cognizable prejudice under the excusable neglect standard. In *Pratt v. Philbrook*, 109 F.3d 18 (1997), the First Circuit rejected a Rule 60(b) motion for relief from a default judgment, explaining: "Of course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent's default. But we do not think that is the sense in which the term 'prejudice' is used in *Pioneer*." *Id.* at 22. Rather, the type of prejudice cognizable under *Pioneer* must consist of a newly created difficulty in litigating the case "in the sense, for example, of lost evidence." *Id.*

In *Bateman v. United States Postal Service*, 231 F.3d 1220 (2000), the Ninth Circuit reversed the district court's finding that a Rule 60(b)(1) movant had failed to show "excusable neglect" within the meaning of *Pioneer* where

an overseas family emergency led to an untimely filed opposition to a summary judgment motion and entry of default. The *Bateman* court explained:

> The prejudice to the Postal Service was minimal. It would have lost a quick victory and, should it ultimately have lost the summary judgment motion on the merits, would have had to reschedule the trial date. But such prejudice is insufficient to justify denial of relief under Rule 60(b)(1).

Id. at 1224-25. *See also TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) ("It should be obvious why merely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment. For had there been no default, the plaintiff would of course have had to litigate the merits of the case, incurring the costs of doing so. A default judgment gives the plaintiff something of a windfall by sparing her from litigating the merits of her claim[.]").

Finally, even before this Court's decision in *Pioneer*, the Fourth, Fifth, and Tenth Circuits made clear that simple exposure to additional litigation does not constitute prejudice in determining whether to grant relief from a tardy filing. *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (per curiam) ("[W]e perceive no disadvantage to Augusta beyond that suffered by any party which loses a quick victory."); *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985) ("[T]he mere possibility of prejudice from delay, which is inherent in every case, is insufficient to require denial of a 60(b)(1) motion."); *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289, 1291 (10th Cir. 1974) ("no prejudice suffered from the enlargement of time" to opt out in order that movant "could pursue potential individual claims in private litigation").

C. The Divergent Approaches Of The D.C. Circuit Underscores The Pervasive Confusion On The Meaning Of Prejudice Under *Pioneer*

Decisions of the D.C. Circuit both support and reject the majority approach to defining prejudice under the *Pioneer* standard, thus signaling that the confusion among the lower courts is real and in urgent need of this Court's clarification.[24] In *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (2006), the D.C. Circuit reversed the district court's refusal to allow a late-filed Rule 60(b) motion seeking to quash a writ of execution against diplomatic residences owned by the Congo. The court stated that "[p]rejudice under Rule 60(b)(1) appears typically and properly to contemplate costs that reconsideration of the final judgment would inflict on the non-moving party *independent of the chance of reversal.*" *Id.* at 840. The court thus declined to interpret *Pioneer*'s excusable neglect standard as "making simple exposure to adjudication a qualifying form of prejudice under Rule 60(b)(1)." *Id.* While the court distinguished *Pigford v. Johanns*, 416 F.3d 12 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1581 (2006), those "distinctions" underscore great confusion.

Pigford affirmed the district court's rejection of late-filed claims of African-American farmers against a settlement fund in a class action alleging discrimination by the United States Department of Agriculture. Applying the *Pioneer* factors, the court found that the prejudice to the government of allowing the late-filed claims militated against finding "excusable neglect" because the government would face increased liability if the opt-in claims were allowed. *See* 416 F.3d at 21-22. This "expansion" of liability, the court concluded, was significant prejudice within the meaning of the *Pioneer* standard. *Id.* at 22.

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[24] *See, e.g., Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as "ha[ving] an intra-Circuit conflict").

The creditors in *FG Hemisphere*, however, *also* faced increased liability in the event that the default was lifted – namely, that the Democratic Republic of the Congo would successfully quash the writs of execution sought against the contested properties. By glossing over the rationale of its earlier decision in *Pigford*, the court in *FG Hemisphere* did not explain how one could square its holding that exposure to liability flowing from the lifting of a default judgment is *not* cognizable prejudice under *Pioneer*, and its holding in *Pigford* that precisely such an "expansion of liability" *is* cognizable prejudice. Nor did the D.C. Circuit explain why the class-settlement context of *Pigford* implicated different concerns from the default judgment in *FG Hemisphere*, apart from its cursory explanation that the government was entitled to the "benefit" of its "bargain" but without identifying how the government would have lost any right under the agreement by excusing the late filing. The divergent approaches of the D.C. Circuit in *FG Hemisphere* and *Pigford* thus highlight the conflict among the circuits about the meaning of prejudice under *Pioneer*.

The time is ripe for the Court to provide clear guidance on this important and recurring question.

II. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER RELIANCE ON A "NORMAL" OR "USUAL" TIMEFRAME FOR DELIVERY OF MAIL CAN CONSTITUTE EXCUSABLE NEGLECT

A. The Court Below Improperly Gave No Weight To The Fact That Petitioners Mailed Their Opt-Outs Within The Normal Timeframe For The Delivery Of Mail

The court below held that petitioners "assumed the risk" that their opt-outs would not make it from Washington, D.C. to West Palm Beach, Florida, within four days, based on its conclusion that there is no "legally cognizable rule assuming that mail will reach its destination within three mailing days." Pet. App. 6a-7a & n.4. Although the court acknowledged that "some case law has referred to a

general standard of three days for mailing," it found that "there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions." *Id.* at 7a n.4.[25]

The requirement of a "set rule that insulates" petitioners from the vagaries of first-class mail delivery in order for them to be eligible for relief makes clear that the court approached the issue merely as a matter of "neglect" and not "excusable" neglect. It gave no weight to the fact that petitioners mailed their opt-out notices four days before the deadline. Nor did the court consider that the opt-out notice did not plainly require the notice to be received by April 11, 2005, but that it be mailed "in time to be received no later than April 11, 2005." *Id.* at 48a. Four days was enough lead time in the normal course for the opt-outs to be received by the deadline. In any event, under *Pioneer*, the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless.

The court faulted petitioners for "using regular first class mail instead of an expedited service such as priority mail," reasoning that Priority Mail is "designed to deliver mail in 2-3 days" and "is clearly identified in the U.S. Postal Service website as a subset of first class mail." *Id.* at 6a & n.2. The court thus necessarily held that, had petitioners sent their opt-out notices via a form of first-class mail that is normally delivered within 2-3 days, that fact would have been entitled to some weight in the excusable neglect analysis. The same website referred to by the court makes plain, however, that "First-Class Mail®" is

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[25] The district court characterized the four-day period as "two business days" (Pet. App. 6a-7a) because the April 7 mailing date was a Thursday and the April 11 due date was a Monday, but even in terms of "business days" it is common knowledge that mail is delivered on Saturdays. *See also* USPS Website ("Postal Business Days are Monday through Saturday (excluding Postal Holidays)."), *at* https://hdusps.esecurecare.net/cgi-bin/hdusps.cfg/php/enduser/std_alp.php?p_sid=Ql5KJBii&xssl=1 (FAQ No. 140 (Postal Business Days)).

also delivered in approximately "2-3-Days."[26] Likewise, Federal Rule of Civil Procedure 6(e) requires the addition of three days to the response time for a pleading where service is effected by mail, which demonstrates that the drafters of the Federal Rules, as approved by this Court, assumed that mail typically arrives within three days.

In *Pioneer*, this Court found a "dramatic ambiguity" in the fact that a notice of the bar date for claims against a debtor's estate – while crystal clear in and of itself ("Bar date is August 3, 1989.") – was in an "inconspicuous" place. 507 U.S. at 384, 398. Despite finding movants' counsel to be "remiss in failing to apprehend the notice," the Court found it would be an abuse of discretion *not* to find excusable neglect on the record before it, which was devoid of any prejudice to the non-movant or judicial administration, or bad faith by the movant. *Id.*

Analogously, in this case the settlement agreement drafted by respondents and plaintiffs' class counsel, and approved by the court, was specifically designed to expose petitioners to the vagaries of mail delivery. Neither overnight delivery nor a postmark due date was permitted. Petitioners mailed their opt-out notices four days before the deadline, and the Postal Service's own website states that the normal delivery time is 2-3 days. Although the district court has some discretion in balancing the various *Pioneer* factors, it may not simply decide to give no weight to a factor based solely on a finding of neglect.[27]

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[26] USPS Website, *at* http://www.usps.com/business/mailingtools/mailingproducts.htm?from=home&page=mailingproductsservices.

[27] Reversal here would mandate a finding of excusable neglect and thus make a remand unnecessary: there is no prejudice; petitioners' reliance on the mails should get considerable weight; and, as the district court acknowledged, there is no evidence that petitioners acted in bad faith. *See Pioneer*, 507 U.S. at 398-99 (no remand where it would be an abuse of discretion not to find excusable neglect). At a minimum, however, the court below would have to "perform again the balancing process." *United States v. Third Nat'l Bank*, 390 U.S. 171, 183-84 (1968); *id.* ("To weigh adequately one of these factors against the other

B. Federal Courts Are Deeply Divided As To Whether Some Weight Or No Weight Should Be Given To Reliance On The "Normal" Or "Usual" Timeframe For Delivery Of Mail

1. The Second, Third, Fifth, and Tenth Circuits hold that reliance on the normal course of mail delivery is to be given significant weight in assessing excusable neglect. In *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1563 n.3 (1991), the Tenth Circuit affirmed the district court's grant of relief from a tardy notice of appeal sent three days in advance of the filing deadline, where mail delivery generally took two days between the cities in question. *See also Maryland Cas. Co. v. Conner*, 382 F.2d 13, 16 (10th Cir. 1967) ("If a lawyer mails a notice of appeal two days ahead of the due date, when one day is ordinarily enough for the mail to be delivered, it would seem clearly unfair to bar the appeal because a storm or other unforeseen cause of delay delayed the delivery. This example is not hypothetical; it has happened.").

The Fifth Circuit in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (1980), reversed the district court and found that a three-day mailing period was sufficient, especially when "the published service standards of the United States Post Office reflect that mail from Selma to Mobile is delivered overnight" and the tardy filer had allowed "twice the normal time for delivery." *Id.* at 1220; *see also Sanchez v. Board of Regents*, 625 F.2d 521, 522 (5th Cir. 1980) ("[R]eliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse [an] otherwise untimely filing."); *cf. In re Cendant Corp. PRIDES Litig.*, 233 F.3d at 197 (listing "misrouted mail" among excusable neglect circumstances that can constitute excusable neglect).

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requires a proper conclusion as to each. Having decided that the court below erred in assessing [one factor], we should remand, so that the District Court can perform again the balancing process mandated by the Act.").

In *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), a tardy notice of appeal was sent four days (two business days) prior to the filing deadline. Explaining that "uncontrollable delays in mail delivery may be a basis for a finding of excusable neglect" under the equitable inquiry required by *Pioneer*, the court took judicial notice of a snowstorm as a possible explanation for the unusual five-day delivery time. *Id.* at 1180 & n.6 (internal quotation marks and emphasis omitted); *see also Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996) ("Normally it is assumed that a mailed document is received three days after its mailing.") (citing Fed. R. Civ. P. 6(e)).[28]

Finally, in *Ramseur v. Beyer*, 921 F.2d 504 (1990), the Third Circuit reversed a district court's refusal to grant relief where a notice of appeal was mailed six days early but arrived seven days late, despite traveling only five miles to the courthouse. Finding that counsel had "reasonably believed" that the notice had been timely mailed, the court held that excusable neglect had been shown. *Id.* at 506-07; *see also* 20 *Moore's Federal Practice* ¶ 304.14[2][a], at 304-54 (2006) ("If the notice of appeal is mailed in time so that in normal course it will arrive in time, but it does not, extensions have been upheld.").

2. In contrast, the Fourth, Sixth, Seventh, and Federal Circuits have all found that reliance on the normal course of mail delivery cannot form the basis for a finding of excusable neglect. Instead, as in the decision below, a litigant is held to assume the risk of delayed delivery. In

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[28] In *Zipperer v. School Board of Seminole County*, 111 F.3d 847 (1997), the Eleventh Circuit found excusable neglect where a tardy notice of appeal had been mailed six days before the required filing date. While the court could be read to have suggested that reliance on "the three days required for normal mail delivery" would be excusable, *id.* at 850, it held otherwise in this case. *See* Pet. App. 7a n.4 ("Although some case law has referred to a general standard of three days for mailing, *see Zipperer*, there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions.") (full citation omitted).

Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530 (1996), the Fourth Circuit found that the district court "most assuredly did not abuse its discretion" in refusing to find excusable neglect. *Id.* at 534. In affirming the lower court's ruling, the court rejected any reliance on a three-day delivery period, holding that a "litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." *Id.*

The Federal Circuit likewise has embraced the view that unaccountable mail delays – or even the failure to deliver mail at all – should be given no weight by a district court in assessing excusable neglect. In that court's view, a litigant in electing "ordinary mail" has "assumed the risk that the motion would not be timely received." *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (1991); *see also Howard v. United States*, No. 91-5111, 1991 WL 263712, at *1 (Fed. Cir. Dec. 16, 1991) (per curiam) (judgment noted at 951 F.2d 1267) (interpreting *Penrod* to mean that, "when a filing is made by ordinary mail, the risk of delay or non-delivery is on the filing party"). And the Sixth Circuit has bluntly held that "[m]ail delays . . . are not grounds for excusable neglect." *In re Crider*, No. 98-2376, 2000 WL 191823, at *3 n.3 (Feb. 10, 2000) (judgment noted at 205 F.3d 1339).

In *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249 (1987), the Seventh Circuit found that a district court did not abuse its discretion in finding that a litigant who mailed his notice of appeal three days before the filing deadline could not rely during the holiday season on the "normal two to three days" required for mail delivery. *Id.* at 1253. And, in a conclusion that starkly conflicts with the Second Circuit's conclusion in *Sherlock*, 84 F.3d at 525, the Seventh Circuit has explicitly rejected a litigant's analogy to Federal Rule of Civil Procedure 6(e)'s allowance of an extra three days for documents served by mail, declaring the argument to be "specious." 808 F.2d at 1253.

C. The Eleventh Circuit's Approach Contravenes The Flexibility Required By *Pioneer*

The court's approach below exemplifies the inflexibility this Court rejected in *Pioneer*, which held that "excusable neglect" is an "elastic concept" demanding consideration of "all relevant circumstances surrounding the party's omission." 507 U.S. at 392, 395. Indeed, *Pioneer* specifically rejected the dissent's approach that would have required a party seeking relief to make a threshold showing of blamelessness *before* argument could be heard on the other prongs of the test. In rejecting that approach, *Pioneer* noted that it would "narrow[] the range of factors to be considered in making the 'excusable neglect' determination," *id.* at 395 n.14, and that incorporating such a "bright-line rule" would erect a "rigid barrier" against relief that was "irreconcilable with our cases assigning a more flexible meaning to 'excusable *neglect*,'" *id.*

But the ruling below – and those of four other circuits – have imposed a "rigid barrier" to relief by precluding reliance on the normal time for mail delivery. By concluding that any fault or lack of diligence by the movant in sending mail automatically makes a missed deadline, in effect, *per se* inexcusable, the lower court likewise failed to adhere to *Pioneer*'s teaching that even "omissions caused by carelessness" (*id.* at 388) can be excusable based on a proper balancing of all the equities.[29]

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[29] A recent en banc panel of the Ninth Circuit noted the general "disarray" and "confusion" in the courts of appeals about the degree of flexibility required by *Pioneer*. *Pincay v. Andrews*, 389 F.3d 853, 857 (2004) (en banc), *cert. denied*, 544 U.S. 961 (2005); *see id.* at 859 ("Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to [*Pioneer*'s] instruction."); *id.* at 860 ("There should similarly be no rigid legal rule against late filings attributable to any particular type of negligence."); *see also In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003) ("On appeal, UCB urges this court to adopt a *per se* rule that garden variety attorney inattention can never constitute excusable neglect. We decline and uphold the district court. The *Pioneer* standard precludes the adoption of any such *per se* rule.").

D. Restricting The Ability Of Class Members To Opt Out Of An Insufficient Settlement Negotiated By Others Implicates Due Process

Resolution of the circuit conflicts at issue here is also critically important to the fair and just administration of class-action litigation. This Court has voiced two core principles in its efforts to reconcile the "inherent tension" between class-action lawsuits and the "day-in-court ideal." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

First, constitutional due process – and not just the dictates of Rule 23 – demands that absent class members be given the opportunity to opt out of a class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."). This right to opt out as an absent class member in turn reflects the deep-rooted preference for a trial on the merits in which the plaintiff is the master of his own complaint.

Second, certification of class settlements requires "'heightened attention'" in order to ensure that class counsel faithfully guards the interests of the class. *Ortiz*, 527 U.S. at 848-49 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) (alteration omitted). This latter principle grows out of this Court's observation that, in negotiating class settlements, class counsel and defendants often pursue interests that are, at best, only proximate to the interests of absent class members. *See id.* at 852 n.30 ([W]ith an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."); *Amchem*, 521 U.S. at 627 (class settlements are as often made "to confine compensation and to limit defendants' liability" as to remedy the harms incurred).[30]

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[30] Commentators have exhaustively documented the reasons why class counsel may not always adequately represent the class members.

Here, plaintiffs' class counsel negotiated a reduced settlement after losing two appeals and facing a possible third reversal on class-certification issues not at issue in petitioners' non-class Illinois state-court action. The settlement amount was negotiated by class counsel and respondents, and overseen by the district court, with the awareness and expectation that petitioners would opt out. Moreover, as respondents and the district court knew at the time, the blow provision was carefully tailored to preclude the possibility that any of the Illinois TPP opt-outs could trigger respondents' blow rights.

The Eleventh Circuit's approach invites class counsel and class-action defendants to inject ever more burdensome opt-out requirements into class settlements in the hopes that a few would-be opt-outs will fail to meet those requirements.[31] By ensuring both that all non-movants will be able to show substantial prejudice in the event that relief from a tardy filing is granted, and that reliance on the normal course of mail delivery can never be excused, the court's approach below places additional barriers to absent class members' due process rights and substitutes a rigid and predetermined formula for the "flexible" and "elastic" balancing test devised by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

See, e.g., Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 Notre Dame L. Rev. 1787, 1800-36 (2004); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 335-41 (2003); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367-84 (1995).

[31] *See, e.g.*, Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. Chi. Legal F. 141, 142 (2003) (documenting "opt-out minimization" techniques deployed by "class settlement designers" to deter opt-outs).

Respectfully submitted,

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October 3, 2006

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14054
Non-Argument Calendar

D.C. Docket No. 99-01317-MD-PAS

VALLEY DRUG COMPANY, ET AL.,
Plaintiffs,

TRUSTEES OF THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION SECURITY BENEFITS FUND – RETIREES, ET AL.,
Plaintiffs-Appellants,

v.

GENEVA PHARMACEUTICALS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(May 3, 2006)

Before TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

In this class action, the district court, pursuant to a settlement agreement that had been negotiated and would be presented to the court for approval, established April 11, 2005, as the deadline for the claims administrator's receipt of opt-out requests. Appellants missed this deadline and moved the court for Fed. R. Civ. P. 6(b) relief – so that they could take their claims elsewhere. The court held a hearing on appellants' motions, considered the par-

ties [*sic*] submissions and arguments, and denied the motions. Appellants appeal the court's rulings.

We review the district court's decision for abuse of discretion. After considering the parties [*sic*] briefs and the relevant portions of the record, we find no such abuse.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-MDL-1317-SEITZ/KLEIN

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

United Wisconsin Services, Inc., et al. v. Abbott Laboratories, N.D. Ill. C.A. No. 99-C-7410(JBZ)

Grosskrueger, el al. v. Abbott Laboratories, et al., N.D. Ill., C.A. No. 99C-7883(JBZ)

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Mednick v. Abbott Laboratories, et al., No. 2:00-3468

O'Neal v. Abbott Laboratories, et al., No. 00-J-1504-S

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State of Florida, et al. v. Abbott Laboratories, et al., S.D. Fla. No. 01-4006-Civ-Gold

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ORDER REGARDING OPT-OUTS FROM THE INDIRECT PURCHASER PLAINTIFF CLASSES' SETTLEMENT

THIS MATTER is before the Court upon (1) the Motion of the Plaintiffs in the Illinois Opt Out Case to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay [DE-1580]; (2) the Motion of Trustees of Correction Officers Benevolent Association Security Benefits Fund Retirees and The Correction Officers Benevolent Association Security Benefits Fund Active, Trustees of Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority (collectively, "the New York TPPs") for Leave to File Late Opt-Out Notices [DE-1586]; (3) the Motion of the Illinois Plaintiffs to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1600]; (4) the New York TPPs' Motion to Join the Motion of the Illinois Opt-Out Plaintiffs to Establish a Conditional Schedule [DE-1598]; and (5) the Motion of the Illinois Plaintiffs for Leave to File a Reply Brief to Address Issues Raised by Defendants in Late-Served Opposition Brief and at Oral Argument [DE-1601]. The deadline by which the Claims Administrator had to receive all third-party payer ("TPP") requests to opt-out of the indirect Purchaser Plaintiff Classes' ("IPP") settlement was April 11, 2005. In these motions, certain TPPs ask the Court to extend the opt-out deadline and/or accept their untimely opt-outs. Having considered all of the submissions and arguments with respect thereto, including the arguments of counsel at the final fairness hearing held on June 28 and June 29, 2005, and otherwise being fully informed in the premises, the Court denies both motions in accordance with its oral rulings at the end of the fairness hearing.

I. The Illinois TPPs

In the Illinois motion, a group of TPPs who are Plaintiffs in *BCBSM, et al. v. Abbott Labs., Inc., and Geneva Pharms., Inc.*, Case No. 03L-009743, before the Honorable

Paddy H. McNamara in Cook County, Illinois, seek a four-day extension of the April 11, 2005, opt-out cutoff. All fifteen of the Illinois TPPs[1] mailed their Requests for Exclusion from the IPP settlement, together with their drug payment data, sometime on Thursday, April 7, 2005. Eight of the notices arrived on or before April 11, 2005, but, as verified by the Claims Administrator, seven of the notices did not arrive until April 13 or April 15, 2005. The Illinois TPPs state that they acted in good faith and with all reasonable diligence, and argue that they should not be penalized for a Postal Service delay that was not within their reasonable control.

The Illinois TPPs rely on Fed. R. Civ. P. 6(b)(2), and argue that they have demonstrated "excusable neglect" for an extension of the opt-out deadline. Rule 6(b)(2) provides that:

> When by these rules or by a notice given thereunder by order of the court an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done when the failure to act was the result of excusable neglect.

As the Supreme Court has explained, the determination of whether to accept a late filing based on excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). The factors to be considered are "the danger of prejudice to the [opposing party], the length of

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[1] The Illinois Plaintiffs are Anthem. Blue Cross Blue Shield of Minnesota, Blue Cross Blue Shield of Massachusetts, Blue Cross Blue Shield of Nebraska, Wellchoice (Empire), Horizon Healthcare Services, Mutual of Omaha Insurance Company, Blue Cross Blue Shield of Tennessee, CareFirst, Excellus Health Plan, Guardian Life Insurance Company, Health Care Service Corp., Federal Mutual Insurance Company, Wellmark, Blue Cross Blue Shield of Florida, and their subsidiaries.

the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* Further, "the starting point and common denominator (indeed, the *sine qua non*) in every case employing an analysis of excusable neglect is an explanation of the reason for the delay." *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 642 & n.4 (M.D. Fla. 2002); *see also* Manual for Complex Litigation (Third) § 30.231 (1995) (stating that "[the Court may, in its discretion, treat as effective a tardy election to opt out. In exercising its discretion, the court should consider the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.").

Upon review of the facts set forth in the affidavit of Lyzette Wallace, of the law firm of Robins, Kaplan, Miller & Ciresi L.L.P., the parties' submissions, and the arguments of counsel at the fairness hearing, the Court finds that there is insufficient evidence to support a finding of excusable neglect. The Illinois TPPs have long been aware of the settlement in this case, and were given ample notice of the April 11, 2005, opt-out deadline. In fact, the Illinois TPPs are represented by the same attorneys who represented Kaiser Foundation Health Plans, Inc., in this multi-district litigation before Kaiser was remanded to California in June 2005. Although the Illinois TPPs urge the Court to place the blame for the late arrival of seven of their opt-out requests on the U.S. Postal Service, the fact remains that they assumed the risk of missing the deadline by allotting only two business days for mailing and using regular first class mail instead of an expedited service such as priority mail.[2] *See In re New England Mut. Life*, 204 F.R.D. 6, 14 (D. Mass. 2001) ("It is

[2] The Illinois TPPs contend that they had no choice but to send their exclusion forms by ordinary first class mail, as that was the method of delivery prescribed in the TPP Notice. However, this argument misses the fact that Priority Mail, designed to deliver mail in 2-3 days, is clearly identified in the U.S. Postal Service website as a subset of first class mail. The Illinois TPPs have failed to provide any explanation as to why they failed to use this expedited method of delivery.

well-established that the party that selects the mode of transmission undertakes the risks associated with that method."). And further, Ms. Wallace's affidavit provides no indication to the Court as to what time on Thursday, April 7, 2005, the exclusion requests were mailed, nor did counsel clarify that issue for the Court at the fairness hearing. The failure to clarify this point leaves the Court to assume that, more likely than not, the opt-out forms were mailed after working hours on April 7, 2005. Thus, it was an exceedingly risky proposition for the Illinois TPPs to presume that the exclusion forms would make it from Washington, D.C., and be received in West Palm Beach, Florida in only two business days.[3]

The Court further finds that the factors enumerated in *Pioneer* do not support the Illinois TPPs' position. First, as explained above, while the Illinois TPPs may not have control over how quickly the mail is delivered, they did have control over how far in advance they mailed their exclusion forms, and what method of delivery they utilized. Despite being fully aware of the approaching deadline, the Illinois TPPs left only two business days for the exclusion forms to be mailed and received, and did not utilize the most expeditious means of delivery that was at their disposal.[4] Second, while the length of the delay was

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[3] The Illinois TPPs also fail to explain why they did not, given the late mailing date, follow up with the Claims Administrator to confirm timely receipt on April 11, 2005, instead waiting until June 16, 2005 to contact Complete Claim Solutions, Inc. This failure further supports a finding that the Illinois TPPs did not act with all reasonable diligence to meet the April 11, 2005, deadline.

[4] The Court also rejects the Illinois TPPs suggestion that there is some legally cognizable rule assuming that mail will reach its destination within three mailing days. Although some case law has referred to a general standard of three days for mailing, *see Zipperer v. School Ed. of Seminole Cty.*, 111 F.3d 847, 850 (11th Cir. 1997), there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions. *See Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de stat*, 808 F.2d 1249, 1253 (7th Cir. 1987) (holding that "claims that Fed. R. Civ. P. 6(e), allowing an extra three days when documents are served by mail,

not substantial, allowing late opt-outs would prejudice the Defendants in that they would be required to litigate against entities who inexcusably failed to submit timely opt-outs forms. Defendants entered into the IPP settlement in order to achieve a full and complete resolution of all IPP claims, and the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations.[5] Third, contrary to their conclusory assertion in the motion, the Illinois TPPs have offered no evidence to support a finding that they acted in "good faith." As the Defendants point out in their response, absent any affidavits or other evidence establishing some good faith reason for their delay,[6] the Court could reasonably conclude that the Illinois TPPs waited until the last minute intentionally with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions.

For these reasons, and upon review of the applicable caselaw cited in the parties' briefs and addressed at the

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was intended to establish presumptively that mail reaches its intended destination in three days [are] clearly specious.").

[5] As part of their argument, the Illinois TPPs contend that Defendants cannot claim to be prejudiced by the late opt-out because they made "their intention to opt out of the indirect purchasers' class action clear" years ago. However, Defendants refute that suggestion, and point out that the Illinois TPPs do not identify when that intention was made clear, and provide no citation or support for their statement. In the absence of any evidence to the contrary, the Court takes as true the Defendants' statement that the Illinois TPPs consistently refused to tell the Defendants whether they intended to opt-out of the MDL action.

[6] At the hearing, counsel for the Illinois TPPs suggested that the reason that the exclusion forms were not sent out until April 7, 2005, was because of the time and effort that it took to gather all of the documentation that was required to be submitted in accordance with the instructions on the exclusion form. However, there is no record evidence on that issue, and indeed, neither the motion nor the affidavit of Ms. Wallace even mentions the document production as a factor. Further, it appears that much of the documentation that was being gathered was not even necessary for the Illinois TPPs to opt-out.

fairness hearing, the Court finds that there is no support for a finding of excusable neglect, such that an extension of the opt-out deadline is warranted.[7] *See Grilli v. Metro. Life Ins. Co., Inc.*, 78 F.3d 1533, 1538 (11th Cir. 1996) (finding no abuse of discretion in the district court's refusal to allow late opt-outs in the absence of a clear showing of excusable neglect); *see also Demint*, 208 F.R.D. at 643; *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 204 F.R.D. 6, 14 (D. Mass. 2001). Accordingly, the Illinois TPPs' Motion to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay is denied.

II. The New York TPPs

Similarly, the New York TPPs ask the Court for leave to file late opt-out notices. The New York TPPs are five plaintiffs represented by the same counsel in a related action captioned *Asher v. Abbott Labs., et al.*, pending in the Supreme Court of the State of New York under the Index No. 123431/99. The *Asher* action was stayed in favor of this multidistrict litigation in July 2003. The New York TPPs state that counsel for the parties in this action should have, but did not, advise their counsel or the New York court of the proposed settlement. Hypothesizing that the choice not to advise them was a "deliberate decision" designed to deprive them of their right to opt-out, the New York TPPs argue that an extension of the opt-out deadline is necessary to avoid the inequitable result of preventing them from pursuing their individual claims.

At the fairness hearing, the Court inquired of Thomas Glenn of Complete Claim Solutions, Inc. ("CCS"), as to whether the New York TPPs were notified of the settlement as part of the TPP Notice Plan. Under oath, Mr.

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[7] This finding is in accordance with other similar actions involving late opt-outs. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 237 (D.N.J. 1997) (recognized that granting leave for an extension of the opt-out deadline is an infrequent occurrence and is only warranted where significant mitigating circumstances exist).

Glenn testified that notices were mailed directly to the New York TPPs, in addition to the notice by publication. Mr. Glenn and counsel for the New York TPPs also confirmed that the addresses that CCS had on file for the New York TPPs were correct and accurate.[8] Having established that notices were mailed to the proper addresses, and in light of the Court's previous finding that the Notice Plan was fair and reasonable and the best notice practicable under the circumstances, there is no basis for extending the opt-out deadline for the New York TPPs.

The only arguments that the New York TPPs advance, in their papers and at the hearing, are that they should be allowed to file late opt-outs because: (1) their case was stayed in favor of this litigation, and it was clear to all of the parties that the New York TPPs had elected to pursue their claims individually; (2) they have shown excusable neglect for the late filing because they did not learn of the settlement until June 2005, when counsel noticed a posting regarding the settlement on a website; and (3) the parties to this multi-district litigation acted in bad faith by "deliberately fail[ing] to disclose the settlement to the New York TPPs or their counsel in the hope that the New York TPPs would not learn of the settlement during the brief opt-out period. None of these arguments merit an extension of the opt-out deadline. As to the first issue, from the Defendants' perspective, it was equally possible that the New York TPPs found the settlement to be a fair and equitable resolution, and chose not to opt-out from the settlement rather than depriving themselves of a share of the settlement proceeds. Second, with respect to the notice issue, the evidence amply demonstrates that the Claims Administrator mailed notices to the New York TPPs at the correct addresses, and that notices were also published in the *Wall Street Journal*, the *New York*

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[8] One of the five New York TPPs, the Transit Workers Fund. has actually filed a partial claim as part of the IPP settlement. That TPP, therefore, cannot now be heard to argue that it was not aware of the settlement or that it should be excused from applicable deadlines.

Times, and other major publications. Because the notice plan was fair and reasonable, and the Court found it to be the best notice practicable under the circumstances, the unfortunate fact that a particular TPP may not have received actual notice has no bearing and does not warrant an extension of the opt-out date. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 238 (D.N.J. 1997) (denying request for extension of opt-out deadline where movants alleged that they did not receive notice or received notice late, but where the notice plan was found to comply with basic requirements of due process).

Finally, the New York TPPs' accusations of bad faith are unsupported by any record evidence. In fact, the Court inquired of counsel for the IPP classes, Geoffrey Horn, regarding his communications with counsel for the New York TPPs, and the Court is satisfied that there was no bad faith involved. While in the future, counsel should consider extending the professional courtesy of contacting counsel for the plaintiffs in stayed cases such as the *Asher* case, in order to avoid situations such as these, there has been no demonstration of bad faith or any derogation of a professional duty on class counsel's part.[9] Accordingly, the New York TPPs have failed to meet their burden of

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[9] Further, counsel for the New York TPPs provides no explanation as to why he failed to follow up regarding the status of this multi-district litigation, instead waiting for the IPP Classes' counsel to take the initiative and call him. In light of the stage of this litigation, and the fact that the *Asher* case was stayed for almost two years, counsel for the New York TPPs should have been following this case and, at the very least, could have done a public records search every few months to determine when trial was scheduled to commence, whether any settlement had been reached, and whether there was a possibility that the stay would soon be lifted. Instead, counsel for the New York TPPs merely states that he had communications with Geoffrey Horn, Esq., counsel for the IPP Classes, in July of 2003 and "after April 2004," without any specification of when the last communication took place. In this regard, it does not appear that the New York TPPs and their counsel acted diligently.

demonstrating excusable neglect, and their motion for leave to file late opt-out notices must be denied.

III. List of Timely, Effective Opt-Outs

In light of the Court's denial of the motions of the Illinois and New York TPPs, those particular entities may not opt-out and are bound by the IPP settlement. For purposes of clarity, the following are the TPPs and consumers whose opt-outs were timely received and who are deemed to have effectively excluded themselves from the IPP settlement:

Effective TPP Opt-Outs

Nissan North America Inc.
c/o Virginia King
Sr. Manager
Employee Recs.
P.O. Box 191
Gardena, CA 90248-0191

Boca Resorts Inc.,
Employee Benefit Plan
c/o Sonia Marrero
Director of Benefits
501 E Camino Real
Boca Raton, FL 33432

Boca Resorts Resorts Club
Employee Benefit Plan
c/o Sonia Marrero
Director of Benefits
501 E Camino Real
Boca Raton, FL 33432

Paul T. Liistro
385 W Center Street
Manchester, CT 06040

Kaiser Found. Health Plan
of Georgia
c/o Mitchell Cohen Sr. Counsel
3495 Piedmont Road NE
Bldg. 9
Atlanta, GA 30305-1736

Kaiser Found. Health Plan
of the Mid-Atlantic
c/o Mitchell Cohen Sr. Counsel
2101 E Jefferson
Rockville, MD 20852

Kaiser Found. Health Plan
of the Northwest
c/o Mitchell Cohen Sr. Counsel
500 NE Multnomah,
Suite 100
Portland, OR

Kaiser Found. Health Plan
of Ohio
c/o Mitchell Cohen Sr. Counsel
North Point Tower 1001
Lakeside Avenue, Suite 1200
Cleveland, OH

DLA Piper Rudnick Gray
Cary US LLP
c/o Tracey M. McClaughlin
HR Benefits
6225 Smith Avenue
Suite 2B
Baltimore, MD

Kaiser Foundation Health
Plan
c/o Mitchell Cohen Sr. Counsel
One Kaiser Plaza
Oakland, CA 94612

Kaiser Foundation Hospitals
c/o Mitchell Cohen Sr. Counsel
One Kaiser Plaza
Oakland, CA 94612

Kaiser Foundation Health
Plan of Colorado
c/o Mitchell Cohen Sr. Counsel
10350 E Dakota Avenue
Denver, CO 80231-1314

Empire BCBS
c/o Mitchell D. Richling VP
11 W 42nd Street
New York, NY 10036

BCBS of Nebraska
c/o Thomas J Jenkins VP
and Gen. Counsel
7261 Mercy Road
Omaha, NE 68180-0001

BCBS of Massachusetts
c/o Steven Skwara
Ass. Gen. Counsel
Robins Kaplan Miller & Ciresi
1801 K Street NW
Washington, DC 20006

Wellmark Inc.
c/o F. Joseph Du Bray
Gen. Counsel
636 Grand Avenue
Des Moines, IA 50309-2565

Swiss Re Life & Health
America Inc.
c/o Peter J. Durand VP
Nat. Trial Counsel
175 King Street
Armonk, NY 10504-1606

Swiss Re America Holding
Corp.
c/o Peter J. Durand
175 King Street
Armonk, NY 10504-1606

Swiss Am Reasurance Co.
Swiss Re Life & Health Am
Inc.
175 King Street
Armonk, NY 10504-1606

Excellus Health Plan Inc.
c/o Ralph Cox Gen. Counsel
Robins Kaplan Miller & Ciresi
1801 K Street NW
Washington, DC 20006-1307

Guardian
c/o Robert D. Grauer
Sen. Atty.
7 Hanover Sq.
New York, NY 10004

Effective Consumer Opt-Outs

Mr. Edward P. McCarthy of East Setauket, NY

IV. Conclusion

For the reasons set forth above, and as articulated on the record at the June 28 and June 29, 2005, fairness hearing, it is hereby

ORDERED that:

(1) The Motion of the Plaintiffs in the Illinois Opt Out Case to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay [DE-1580] is DENIED;

(2) The Motion of Trustees of Correction Officers Benevolent Association Security Benefits Fund-Retirees and The Correction Officers Benevolent Association Security Benefits Fund Active, Trustees of Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority for Leave to File Late Opt-Out Notices [DE-1586] is DENIED;

(3) The Motion of the Plaintiffs in the Illinois Opt-Out Case to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1600] is DENIED, as the Illinois TPPs have failed to provide any justification or supporting authorities for the extraordinary request that the period of time for objections be reopened, following a two-day fairness hearing and following the Court's oral ruling finally approving the IPP settlement;

(4) The New York TPPs' Motion to Join the Motion of the Illinois Opt-Out Plaintiffs to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1598] is DENIED, for the same reasons articulated in paragraph 3 above;

(5) The Motion of the Plaintiffs in the Illinois Opt-Out Case for Leave to File a Reply Brief to Address Issues Raised by Defendants in Late-Served Opposition Brief

and at Oral Argument [DE-1601] is DENIED, in light of the fact that the Court orally announced its ruling denying the Illinois TPPs' motion for leave to file a late opt-in at the fairness hearing, and the Illinois TPPs fail to provide any authorities or arguments justifying the reversal of the Court's ruling.

DONE and ORDERED in Miami, Florida, this 8th day of July, 2005.

/s/ PATRICIA A. SEITZ
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:
U.S. Magistrate Judge Theodore Klein
All Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14054-DD

VALLEY DRUG COMPANY, ET AL.,
Plaintiffs,

TRUSTEES OF THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION SECURITY BENEFITS FUND – RETIREES, ET AL.,
Plaintiffs-Appellants,

v.

GENEVA PHARMACEUTICALS, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

[June 7, 2006]

BEFORE: TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

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www.rkmc.com

JAMES S. HARRINGTON
617-859-2730

February 9, 2006

VIA FEDERAL EXPRESS

U.S. District Court, Southern District of Florida
Clerk's Office, Appeals Section
301 North Miami Avenue
Miami, FL 33128

Re: Re: In re Terazosin Hydrochloride
No. 99-MDL-1317

Dear Sir or Madam:

We represent the Illinois Plaintiffs in this matter. Supplementing our August 18, 2005 letter in which we designated those docket entries in 99-MDL-1317 that are pertinent to our client the Illinois Plaintiffs' appeal pending before the Eleventh Circuit, the Illinois Plaintiffs hereby designate the additional docket entry to be forwarded to the Eleventh Circuit: **1594**. We enclose the relevant page of the docket that reflects this supplement.

Since briefing is complete in the Eleventh Circuit, we request that D.E. 1594 be sent immediately to the Clerk of the Eleventh Circuit Court of Appeals. The Eleventh Circuit case number 05-14054-DD.

We appreciate your cooperation in this time-sensitive matter. This docket entry was not previously designated because it was filed under seal; Judge Seitz just recently unsealed the document and so our request is being made at this time. (See Order at D.E.1666).

BEST AVAILABLE COPY

Please feel free to contact the undersigned should you have any questions or concerns. We apologize for any inconvenience. Your continuing assistance in this matter is greatly appreciated.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

/s/ JAMES S. HARRINGTON
James S. Harrington

Enclosures

cc: All Counsel of Record

RIDER A
TO THE SETTLEMENT AGREEMENT

This **Rider A** is filed under seal, and is supplemental to the Settlement Agreement (the "**Settlement Agreement**") dated March 1, 2005, among the Plaintiff States, Indirect Purchaser Plaintiffs and Defendants Abbott Laboratories, and Geneva Pharmaceuticals, Inc. (now known as Sandoz Inc.), to be used in determining the Events of Termination defined and described therein.

I. **Definitions**. The following terms have the meanings ascribed to them herein. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement.

A. "**Illinois TPPs**" means the TPP members of the IPP Settlement Classes on whose behalf the Second Amended Complaint was filed in the action *BCBSM, Inc. et al. v. Abbott Laboratories et al.* now pending in Circuit Court of Cook County, Illinois, Case No. 03 L 009743. The style of the Illinois TPPs' Second Amended Complaint, reflecting the plaintiffs therein, is attached as Exhibit 1 to this Rider A.

B. "**Total TPP Terazosin Payments**" means $250,000,000, which the Parties agree only for purposes of the Settlement Agreement and this Rider A to be the total of all payments by TPPs for Terazosin Products purchased in, or sent via mail order to, the eighteen (18) IPP Class states during the period January 1, 1998 to December 31, 1999. The agreement to use this figure for the purpose just specified is not an agreement or acknowledgment (and shall not be relied upon as evidence or support for the contention) that this information is appropriately used for any other purpose, whether in connection with MDL No. 1317 or otherwise.

C. "**TPP Opt-Out Payment**" means the amount of the payments made by a TPP that executes and files a timely and valid Notice of Exclusion on or before the Third Party Payer Opt-Out Deadline for Terazosin Prod-

ucts purchased in, or sent via mail order to, the eighteen (18) IPP Class states from January 1, 1998, to December 31, 1999.

D. "**TPP Threshold Amount**" means $12,500,000, which is five percent (5%) of the Total TPP Terazosin Payments as defined above.

II. Determination of TPP Opt-Out Payments.

A. The TPP Notice of Exclusion requests that any opting-out TPP provide its total payments for Terazosin Products purchased in, or sent via mail order to, the eighteen (18) IPP Class states from January 1, 1998 to December 31, 1999. The TPP Notice of Exclusion further requests that the accuracy of this information be certified by the TPP under penalty of perjury. The TPP Notice of Exclusion also states that a timely and valid opt-out must be sent in time to be received by the Settlement Administrator no later than the close of business on April 11, 2005.

B. For any TPP that opts out and provides all of the requested payment information on a timely and duly-certified TPP Notice of Exclusion, the TPP Opt-Out Payment for that TPP shall be the amounts specified on its Notice of Exclusion.

III. Defendants' Rights to Terminate the Settlement Agreement

A. If (1) all TPPs that opt out provide all of the requested payment information on their timely and duly certified TPP Notices of Exclusion, and (2) the total of all TPP Opt-Out Payments determined as set forth in Section II.B above, excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out, equal or exceed the TPP Threshold Amount (or if less than all TPPs that opt-out provide all of the requested payment information but the total of all information that is received exceeds the TPP Threshold Amount), then Defendants shall have the right to exercise the termination rights provided in Section IV.A and X.A.1 of the Settlement Agreement. This

termination right may be exercised at Defendants' sole discretion at any time prior to 5:00 pm Pacific time on May 9, 2005, *except* as set forth below in paragraph III.B.

B. If (1) all TPPs that opt out provide all of the requested payment information on their timely and duly certified TPP Notices of Exclusion, and (2) the total of all TPP Opt-Out Payments determined as set forth in Section II.B above, excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out, is less than 40% of the TPP Threshold Amount, then Defendants' termination right shall be exercised, if at all, no later than 5:00 p.m. Pacific time on April 14, 2005.

C. In the event that one or more TPPs provide timely Notices of Exclusion that do not contain all of the payment information requested on the Notice of Exclusion form, then if Defendants have not exercised any right to terminate pursuant to Paragraph III.A above (by virtue of the fact that forms received with complete payment data exceed the TPP Threshold Amount), then the parties will cooperate between the TPP Opt-Out Deadline and 5:00 p.m. Pacific time on May 9, 2005, in a good faith effort to obtain information sufficient to determine the amounts of such TPPs' TPP Opt-Out Payments. Such efforts may include, without limitation, (1) seeking expedited discovery from the TPP; (2) using an approximation based on other drug cases, including the Cardizem CD litigation if possible; (3) using public data, such as IMS or covered lives; and (4) using the services of Professor Eric Green, the mediator in this case. In this event, however, Defendants shall nonetheless have the right to terminate if by May 9, 2005 they determine in good faith based upon their best estimates of total TPP Opt-Out Payments that the TPP Threshold Amount has been exceeded.

D. As a separate and independent termination right, if 300 or more Consumers, either individually or by one or more representatives, submit valid and timely requests to be excluded from the IPP Settlement Classes on or before the Consumer Opt-Out Deadline, then Defendants shall

have the right to exercise the termination rights provided in Section IV.A and X.A.1 of the Settlement Agreement. This separate and independent termination right may be exercised in good faith by Defendants at any time prior to 5:00 pm Pacific time on June 20, 2005.

IV. Agreement to File Rider A Under Seal. The Defendants and Plaintiffs shall present this Rider A to the Court in confidence, to be filed under Seal, and shall take all reasonable steps necessary to maintain the confidentiality of this Rider.

[attorney signature and address blocks omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-MDL-1317-SEITZ/KLEIN

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

United Wisconsin Services, Inc., et al. v. Abbott Laboratories, N.D. Ill. C.A. No. 99-C-7410(JBZ)

Grosskrueger, el al. v. Abbott Laboratories, et al., N.D. Ill. C.A. No. 99C-7883(JBZ)

Reid, et al. v. Abbott Laboratories, et al., D.D.C. C.A. No. 00-323

Scafani v. Abbott Laboratories, et al., N.D. Cal. C.A. No. 00-00508-SBA

Mednick v. Abbott Laboratories, et al., No. 2:00-3468

O'Neal v. Abbott Laboratories, et al., No. 00-J-1504-S

Grund v. Abbott Laboratories, et al., No. _____.

Blue Cross and Blue Shield of Alabama, Inc. v. Abbott Laboratories, et al., No. 00-1303-Civ.-Lenard

Bernstein v. Abbott Laboratories, E.D. Mich. C.A. No. 2:00-CV-72974

Blue Cross and Blue Shield of Michigan v. Abbott Laboratories, et al., No. 5:01-CV-95

State of Florida, et al. v. Abbott Laboratories, et al., S.D. Fla. No. 01-4006-Civ-Gold

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INDIRECT PURCHASER PLAINTIFF CLASSES' AND PLAINTIFF STATES' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, CERTIFICATION OF THE PROPOSED TENNESSEE INDIRECT PURCHASER SETTLEMENT CLASS FOR PURPOSES OF SETTLEMENT AND REVISING END DATE IN DEFINITION OF PREVIOUSLY CERTIFIED CLASSES AND APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE TPP AND CONSUMER MEMBERS OF THE IPP CLASSES

The Indirect Purchaser Plaintiff Classes (the "IPP Classes")[1] and the States of Florida, Kansas, and Colorado (the "Plaintiff States"), as defined in the Settlement Agreement (collectively, the "Plaintiffs"), respectfully move the Court for an order, attached as Exhibit 2 hereto, (1) preliminarily approving a settlement between the Plaintiffs and Defendants Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. (now known as Sandoz, Inc.) ("Geneva"), dated March 3, 2005, and attached hereto as Exhibit 1; (2) certifying the proposed Tennessee Indirect Purchaser Class for purposes of settlement and extending the end date of the previously certified classes to March 7, 2005, (3) approving and ordering the implementation of the Notice Plan, Attachment C to the Settlement Agreement, which includes the Consumer Notice of Settlement (including Consumer Claim Form) (Exhibit 3 hereto), the Consumer Summary Notice of Settlement (Exhibit 4 hereto), the TPP Notice of Settlement (including TPP Notice of Exclusion and Claim Form) (Exhibit 5 hereto), and the TPP Summary Notice of Settlement (Exhibit 6 hereto); and (3) approving and ordering the implementation of the Consumer Distribution Plan (Exhibit 7 hereto), the TPP Distribution Plan (Exhibit 8 hereto), and the Government Compensation Plan (Exhibit 9

[1] All capitalized terms have the meanings agreed to in the Settlement Agreement unless otherwise specified herein.

hereto), in accordance with the Settlement Agreement. In support of the Motion, Plaintiffs respectfully show the Court as follows:

1. The Plaintiffs and the Defendants have entered into a Settlement Agreement (the "Proposed Settlement," attached hereto as Exhibit 1), subject to Rule 23(e) of the Federal Rules of Civil Procedure and Court approval, whereby, in exchange for a total cash payment of $30,700,000, $18,420,000 from Abbott and $12,280,000 from Geneva, the Plaintiffs release all Claims that were or could have been asserted against the Defendants in the Complaints in MDL 1317, and the Defendants have agreed to dismiss their Rule 23(f) appeal now pending in the Eleventh Circuit Court of Appeals of the IPP Classes' Certification Order. For settlement purposes only, the parties have agreed, subject to approval by the Court, that the class period certified by the Court on April 8, 2004, be extended to run from October 15, 1995, to the date of preliminary approval of the Proposed Settlement, which is currently anticipated to be March 7, 2005.

2. The proposed Tennessee Indirect Purchaser Class should be certified in light of settlement and the end date for the previously certified classes should be extended to March 7, 2005. In support of this motion, Plaintiffs submit the Declaration of Geoffrey M. Horn (Exhibit 7 hereto) and a memorandum of law being filed contemporaneously herewith.

3. The Proposed Settlement was achieved as a result of vigorous arm's-length negotiations between counsel for the Plaintiffs and counsel for the Defendants, with the assistance of a highly experienced mediator.

4. The Proposed Settlement will confer substantial benefits on the IPP Classes and the Plaintiff States, including: (1) a substantial financial recovery, and (2) the elimination of litigation risks against the Defendants. The Proposed Settlement is well within the range of possible approval by the Court.

5. Preliminary approval is the first step of a two-step process for approval of proposed class action settlements under Rule 23 of the Federal Rules of Civil Procedure. In the first step, the Court determines whether the Proposed Settlement falls within the range of possible approval. *See Manual for Complex Litigation, Third* (1995), §30.41. In the second step, after notice of the Proposed Settlement to the Class and an opportunity for Class members to object or otherwise be heard, the Court will determine whether to grant final approval of the Proposed Settlement as fair and reasonable under Rule 23.

6. The Proposed Settlement satisfies all of the factors required for preliminary approval under Rule 23, in that it falls within the range of possible approval, and thus the Settlement's terms should be provided to the IPP Classes as requested by this Motion.

7. Plaintiffs request that this Court appoint Complete Claims Solution, Inc. ("CCS") as the Settlement Administrator. CCS has administered numerous similar class settlements, including the previous settlement in this action with Defendant Ivax Pharmaceuticals, Inc. CCS's duties shall be those specified in the Settlement Agreement and related documents.

8. Plaintiffs request that the Court enter an order approving the Consumer Distribution Plan, TPP Distribution Plan, and Government Compensation Plan, attached hereto as Exhibits 7, 8, and 9, respectively, which set forth the allocation payment of the Settlement Funds in this case.

9. Plaintiffs request that the Court enter an Order directing that the Notice Plan (Attachment C to the Settlement Agreement) be implemented for TPP members of the IPP Classes by direct mailing of the TPP Notice of Settlement (including the Notice of Exclusion and Claim Form, Exhibit 5 hereto) to TPPs in the Settlement Administrator's database. The Notice Plan will notify all reasonably ascertainable TPP members of the IPP Classes of

their rights with respect to the Proposed Settlement and comply with the requirements of due process.

10. Plaintiffs request that the Court enter an Order directing that the Notice Plan be further implemented for TPP members of the IPP Classes by publication of the TPP Summary Notice of Settlement (Exhibit 6 hereto), as set forth in the Notice Plan, by the Settlement Administrator.

11. Plaintiffs request that the Court enter an Order directing that the Notice Plan be implemented for Consumer members of the IPP Classes by direct mailing of the Consumer Notice of Settlement (including the Consumer Claim Form) (Exhibit 3 hereto) to all Consumers identifiable in the Settlement Administrator's database from the Ivax Settlement Agreement. The Notice Plan will notify all reasonably ascertainable potential Consumer members of the IPP Classes, and all potential Consumer members of the IPP Classes who request a copy of the Consumer Notice, of their rights with respect to the Proposed Settlement and comply with the requirements of due process.

12. Plaintiffs request that the Court enter an Order directing that the Notice Plan be implemented by publication of the Consumer Summary Notice of Settlement (Exhibit 4 hereto), as set forth in the Notice Plan, by the Settlement Administrator.

13. Plaintiffs seek the Court's approval for the following proposed schedule for proceedings on the Proposed Settlement:

(a) Notice of Settlement mailed to TPP members of the IPP Classes starting March 10, 2005 and completed by March 11, 2005;

(b) Summary Notice of Settlement to TPP members of the IPP Classes to be published on March 11, 2005;

(c) TPP members of the IPP Classes submit any Notices of Exclusion for receipt on or before April 11, 2005;

(d) TPP members of the IPP Classes to submit any objections or notices of intent to appear at the Final Fairness Hearing on or before April 11, 2005;

(e) Notice Plan for Consumer members of the IPP Classes to be implemented beginning March 11, 2005, and completed by May 15, 2005;

(f) Consumer members of the IPP Classes to submit any Notices of Exclusion and objections on or before June 15, 2005;

(g) Plaintiffs' Memorandum in Support of Final Approval of the Settlement, the State Plaintiffs' Motion for Attorneys Fees and Costs, and any IPPs' application for attorneys' fees, expenses, and incentive awards to be filed on or before June 20, 2005;

(h) Hearing before the Court in final approval of the Settlement on June 27, 2005, subject to the Court's convenience; and

(i) Claim Forms Submitted by TPPs and Consumers to the Settlement Administrator to be postmarked no later than July 15, 2005.

14. IPPs and Defendants have agreed that Defendants may terminate this settlement under certain circumstances related to requests for exclusion by members of the IPP classes. The terms are set forth in Rider A to the Settlement Agreement, which the Parties request be filed under seal. Knowledge of the terms of Rider A is not necessary for any member of the IPP classes to consider options available to it.

15. Submitted contemporaneously herewith is the Plaintiffs' memorandum of law supporting this Motion.

16. A proposed Order is attached as Exhibit 2 hereto.

WHEREFORE, Plaintiffs respectfully move the Court to enter an Order:

A Granting preliminary approval of the Settlement with the Defendants in the form of the Proposed Order attached hereto as Exhibit 2;

B Certifying a Tennessee indirect Purchaser Class for purposes of settlement and extending the end date of the previously certified classes through and including March 7, 2005;

C Approving the Notice Plan for TPP members of the IPP Classes (Attachment C to the Settlement Agreement), and ordering the mailing of the TPP Notice of Settlement (including the Notice of Exclusion and Claim Forms) (Exhibit 5 hereto) and the publication of the TPP Summary Notice of Settlement (Exhibit 6 hereto) as provided therein;

D Approving the Notice Plan for Consumer members of the IPP Classes (Attachment C to the Settlement Agreement) and ordering the mailing of the Consumer Notice of Settlement (including the Consumer Claim Form) (Exhibit 3 hereto) and the publication of the Consumer Summary Notice of Settlement (Exhibit 4 hereto) as provided therein;

E Approving the Consumer Distribution, TPP Distribution, and that portion of the Government Compensation Plan, allocating amounts specified for the Designated Governmental Entities and civil penalties to Colorado; attached hereto as Exhibits 7, 8, and 9;

F Approving the appointment of CCS as the Settlement Administrator;

G Approving the schedule as set forth above;

H Approving the filing of Rider A to the Settlement Agreement under seal until thirty (30) days after the Effective Date; and

H. Pending the effective date of the Settlement Agreement, enjoining all members of the IPP Classes from instituting, commencing or prosecuting any action

against the Defendants based upon or relating to the claims released as set forth in the Settlement Agreement.

Respectfully submitted this 3rd day of March, 2005.

[attorney signature and address blocks omitted]

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

Master File No. 99-MDL-1317
MDL No. 1317

NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT AND FAIRNESS HEARING

TO: ALL THIRD PARTY PAYERS THAT HAVE AT ANY TIME FROM OCTOBER 15, 1995 THROUGH MARCH 7, 2005 (THE "CLASS PERIOD") PAID ALL OR PART OF THE PURCHASE PRICE OF HYTRIN® OR ITS AB-RATED GENERIC BIOEQUIVALENTS ("TERAZOSIN PRODUCTS") INCLUDING ALL FORMS OF TERAZOSIN HYDROCHLORIDE OTHER THAN FOR RESALE, IN **ALABAMA, CALIFORNIA, FLORIDA, ILLINOIS, KANSAS, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA OR WISCONSIN, OR VIA MAIL FOR RESIDENTS OF SUCH STATES.**

THIS NOTICE EXPLAINS YOUR RIGHTS – PLEASE READ IT CAREFULLY

I. PURPOSE OF THIS NOTICE

The parties to the above-captioned actions pending before the Honorable Patricia A. Seitz of the United States

District Court for the Southern District of Florida (the "Court") have agreed to a Settlement, described in more detail in Section IV. The Settlement is subject to approval by the Court. The purpose of this Notice is to inform Third Party Payer ("TPP") Members of the Indirect Purchaser Plaintiff ("IPP") Settlement Classes (described below) of their rights. The provisions in this Notice are qualified and subject in their entirety to the terms of the Settlement Agreement, copies of which are available for review in the manner provided in Section IX. Capitalized terms used but not defined herein have the meanings given to them in the Settlement Agreement.

II. THE SETTLEMENT CLASSES

The "IPP Settlement Classes" consist of all Consumers and TPPs who purchased and/or paid all or part of the purchase price of Terazosin Products in one or more of the following states – **Alabama, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, West Virginia, and Wisconsin** – or via mail order for delivery in one or more of those states, at any time during the period October 15, 1995 through March 7, 2005 (the "Class Period"). Excluded from the IPP Settlement Classes are the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Terazosin Products for resale, to the extent of such purchases for resale; direct purchasers of Terazosin Products from Defendants, to the extent of such direct purchases; and indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct.

"Third Party Payer" or "TPP" for these purposes means any entity that was (a) a party to a contract, issuer of a policy or sponsor of a plan, and was also (b) at risk, pursuant to such contract, policy or plan, to pay or reimburse all or part of the cost of Terazosin Products dispensed to

natural persons covered by such contract, policy, or plan. Entities with self-funded plans that contract with a health insurance company or other entity to serve as a third party claims administrator to administer their prescription drug benefits may qualify as TPPs. If such an entity's contract with its claims administrator does not shift the financial risk for the purchase of Terazosin Products from the entity to its claims administrator or otherwise assign the entity's rights in any recovery under this Settlement to its claims administrator, the entity with the self-funded plan (rather than the claims administrator) will be a TPP for purposes of this Settlement. Entities with self-funded plans should also be aware that any agreements that they may have with third party claims administrators may affect their ability to, or the terms under which such entities may, assert any claim against the Third Party Payer Settlement Fund, as well as the amount of any recovery to which such entity may be entitled. Entities with self-funded plans that maintain such contractual arrangements with third party claims administrators should review the terms of their administrative services agreements before making any claim against the Third Party Payer Settlement Fund to determine whether the entity or its third party claims administrator possesses the claim and/or has the right or obligation to assert the claim or the right to any or all proceeds that may be paid on the claim.

"Consumer" is any natural person who purchased and/or paid all or part of the purchase price of Terazosin Products during the Class Period.

"Plaintiff States" are the States of Colorado, Florida and Kansas.

III. BACKGROUND TO THIS LITIGATION

The Indirect Purchaser Plaintiffs' Complaints. Between 1999 and 2001, a number of Consumer Plaintiffs (including Martin Bernstein, Lavera Grosskrueger, David Grund, William Mednick, Albert J. Meyer, Willie O'Neal, and Victor Scafani) and TPP Plaintiffs (including Cobalt

Corporation (formerly known as United Wisconsin Services, Inc. and now known as Crossroads Acquisition Corporation), Blue Cross and Blue Shield of Alabama, and Blue Cross and Blue Shield of Michigan) (collectively, the "Indirect Purchaser Plaintiffs" or "IPPs") filed class action lawsuits against Abbott Laboratories ("Abbott"), and Geneva Pharmaceuticals, Inc. ("Geneva") (now known as Sandoz Inc.) (collectively "Defendants"), contending that between October 15, 1995 and August 1999, Defendants allegedly violated antitrust and consumer protection laws through conduct relating to the sale of Terazosin Products. The plaintiffs sought declaratory judgments, restitution for unjust enrichment, damages, and other equitable relief. Each of these cases is currently pending before the Honorable Patricia A. Seitz of the United States District Court for the Southern District of Florida, before whom the Judicial Panel on Multidistrict Litigation coordinated these actions in MDL No. 1317 on December 20, 1999. *In re Terazosin Hydrochloride Antitrust Litigation*, 2000 WL 33951466 (J.P.M.L. Dec. 20, 1999). In 2002, the IPPs filed their Fourth Amended Coordinated Class Action Complaints (the "IPP Complaints").

The Plaintiff States' Complaint. On September 27, 2001, the Plaintiff States filed a complaint against Defendants in the United States District Court for the Southern District of Florida on their own behalf, on behalf of certain state agencies, and through their statutory, equitable or common law authority or as representative of or *parens patriae* on behalf of natural person citizens of Florida and Kansas, contending that Defendants allegedly violated antitrust and consumer protection laws through conduct relating to the sale of Terazosin Products and seeking injunctive relief, civil penalties, damages, disgorgement, restitution and other equitable relief.

Class Certification. On September 4, 2001, the IPPs moved to certify various state classes of Consumers and Third Party Payers. On April 8, 2004, the Court entered an order ("Class Certification Order") certifying the fol-

lowing state-wide classes of indirect purchasers in Alabama, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, West Virginia, and Wisconsin:

> All persons and entities who or which have at any time from October 15, 1995 to June 30, 2002, paid all or part of the purchase price of Terazosin Products other than for resale, in the seventeen (17) states listed above or via mail for delivery to those same seventeen (17) states. Excluded from the state-wide classes were the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Terazosin Products for resale, to the extent of such purchases for resale; direct purchasers of Terazosin Products from Defendants, to the extent of such direct purchases; and indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct.

In re Terazosin Hydrochloride Antitrust Litigation, 220 F.R.D. 672 (S.D. Fla. 2004). On April 22, 2004, Defendants petitioned the United States Court of Appeals for the Eleventh Circuit for leave to appeal this decision pursuant to Fed. R. Civ. P. 23(f) and, on June 4, 2004, the Eleventh Circuit granted the petition. As of November 30, 2004, the briefs of the parties to the appeal were fully submitted. As of the date of this Notice, the Eleventh Circuit has not ruled on Defendants' appeal. The Court has, in addition to the previously certified seventeen (17) states, certified a Tennessee IPP Settlement Class in light of this Settlement (collectively, the 18 state classes are the "IPP Settlement Classes"), and extended the end date of the Class Period to March 7, 2005.

Summary Judgment. On April 26, 2004, IPP Plaintiffs and Defendants filed various Motions for Summary Judgment. On August 3, 2004, the Court heard oral ar-

gument on those motions. On August 31, 2004, the Court granted Defendants' motion and denied Plaintiffs' motions related to Plaintiffs' monopolization claims against Abbott under state laws analogous to Section Two of the Sherman Act. On January 5, 2005, the Court granted Plaintiffs' motion and denied Defendants' motions related to Plaintiffs' claims that Defendants had violated certain state laws analogous to Section One of the Sherman Act by entering into an agreement related to patent litigation between the Defendants. On February 9, 2005, Defendants filed a Petition for Writ of Mandamus with the United States Circuit Court of Appeals for the Eleventh Circuit. As of the date of this Notice, the Eleventh Circuit has not ruled on Defendants' petition.

Coordinated Discovery. Since 1999, the IPPs and Plaintiff States have cooperated in and coordinated their joint prosecution of claims for the benefit of the Consumers and Third Party Payers they respectively represent. They have conducted extensive economic and factual investigation relating to the claims, underlying events, and transactions alleged in the IPP Complaints and the Plaintiff States' Complaint (collectively, the "Complaints"), including review of in excess of a million pages of documents, the taking of more than fifty (50) depositions of defense and non-party witnesses, production of data by Plaintiffs, the giving of deposition testimony by various Plaintiffs, the consultation with expert witnesses and the taking of expert discovery, and extensive legal research on the applicable statutes and case law of the fifty (50) states and the District of Columbia.

Trial. On August 24, 2004, the Court ordered that the trial of all plaintiffs in MDL No. 1317 would proceed against the Defendants beginning April 11, 2005. On February 4, 2005, the Court ordered that, while the trial of other plaintiffs would proceed on April 11, 2005, trial of the IPPs and Plaintiff States would be postponed until the Eleventh Circuit ruled on Defendants' appeal from the Class Certification Order. On February 25, 2005, the

Court continued the trial of other plaintiffs' claims in light of provisional settlements of those claims.

IV. SETTLEMENT OF THESE CASES

In April 2004, the Court ordered that the parties to this litigation explore settlement through mediation with Professor Eric Green, an experienced and prominent mediator (the "Mediator"), while continuing with the litigation. With the help of Professor Green, the parties agreed to this Settlement, subject to approval of the Court and the terms and conditions of the Settlement Agreement and related documents. Throughout this process, arm's-length negotiations occurred among counsel for IPP Plaintiffs, the Plaintiff States and counsel for Third Party Payers to determine how the Net Settlement Fund would be allocated among Consumers and Third Party Payers.

Defendants deny each and every one of Plaintiffs' allegations of unlawful and inequitable conduct and Plaintiffs' entitlement to damages, restitution or any other legal or equitable relief in connection with Plaintiffs' claims and have asserted a number of defenses to Plaintiffs' claims which Defendants believe to be meritorious. While Defendants have agreed to settle the matter on the terms described herein, Defendants are prepared to litigate each of these matters vigorously if the Settlement is not approved. Defendants do not admit any wrongdoing by entering into this Settlement. If the Settlement is not finally approved by the Court, the Parties will resume litigating each of these cases, including the certification of the IPP classes, and there will be no assurance that any plaintiff or any member of the IPP classes can obtain a recovery.

The following description summarizes key terms of the Settlement. The Settlement Agreement is on file with the Court and can be reviewed as more fully described in Section IX.

The Settlement Agreement provides:

a. Settlement Funds. Defendants will collectively pay the sum of $30,700,000 as part of this Settlement. This amount, together with any interest earned thereon, constitutes the "Aggregate Settlement Fund." The Aggregate Settlement Fund, less Court-approved amounts paid for (1) a State Settlement Fund, (2) attorneys' fees and expenses incurred during the litigation, and (3) certain escrow agent fees associated with the Aggregate Settlement Fund (the "Net Settlement Fund") will be allocated to separate settlement funds for Consumers and Third Party Payers for (1) distribution to the members of the IPP Settlement Classes who or which file timely and valid Proofs of Claim, on the forms accompanying this Notice, containing the information requested therein, in accordance with the terms described below, (2) the costs of providing notice to the IPP Settlement Classes and administration of the Settlement, and (3) payment of incentive awards to Plaintiffs.

The Net Settlement Fund will be allocated as follows:

(1) The State Settlement Fund. The Attorney General of the State of Florida, as State Liaison Counsel, along with the Attorneys General of the States of Kansas and Colorado, have been involved in the investigation and litigation of this case for nearly five years. The State Settlement Fund is created to settle the claims of certain governmental entities and Attorney General-specific remedies, and state costs and fees. The State Settlement Fund totals $2,000,000, plus interest earned on that amount, to be paid from the Aggregate Settlement Fund. The Plaintiff States have worked for the benefit of agencies and consumers in this case. For these efforts, and subject to Court approval, the Plaintiff States, and primarily the State of Florida, as State Liaison Counsel, will ask to be reimbursed up to $1,625,000 from the State Settlement Fund for their fees and costs.

(2) IPP Attorneys' Fees and Expenses. IPPs' Co-Lead Counsel will apply for an award of attorneys' fees

not exceeding thirty percent (30%) of the Aggregate Settlement Fund less the State Settlement Fund. Such fees would be distributed among the law firms that have litigated cases on behalf of IPPs in MDL 1317 since 1999. In addition, IPPs' Co-Lead Counsel will apply for reimbursement of the accountable out-of-pocket expenses they have incurred in the prosecution of these cases since 1999, including expert witness fees and their respective shares of the fees of the Mediator. The application for accountable expenses will be for an aggregate amount not to exceed $2,000,000.

(3) Notice Costs. The costs of providing notice to the Consumer members of the IPP Settlement Classes will be paid from the Consumer Settlement Fund (described below). The costs of providing notice to the TPP members of the IPP Settlement Classes will be paid from the TPP Settlement Fund (described below).

(4) Incentive Awards. Certain named plaintiffs spent a significant amount of unreimbursed time and expenses litigating these cases for the benefit of the absent members of the IPP Settlement Classes. IPPs will seek awards of incentive fee payments to such plaintiffs in an amount not to exceed $120,000 for TPP Plaintiffs and $30,000 for Consumer Plaintiffs. Incentive awards for Consumer Plaintiffs will be paid from the Consumer Settlement Fund, and incentive awards for TPP Plaintiffs will be paid from the TPP Settlement Fund.

b. The Consumer Settlement Fund. Twenty-five percent (25%) of the Net Settlement Fund, the "Consumer Settlement Fund," shall be set aside to pay notice and administration costs of the Consumer Settlement Fund and incentive payments awarded to Consumer Plaintiffs, if any, with the balance of the Consumer Settlement Fund to be paid to satisfy the claims of Consumer members of the IPP Settlement Classes who file timely and valid Proofs of Claim. Payments to Consumer members of the IPP Settlement Classes will be based on the total amount of Terazosin Product purchases made in the 18 settlement

class states submitted in timely and valid Consumer Proofs of Claim. If the total amount of Terazosin Product purchases made in the 18 settlement class states claimed by Consumers exceeds the amount available for distribution to Consumer members of the IPP Settlement Classes, said members will receive their pro rata share of the Consumer Settlement Fund. If, after payment of (a) Court-approved costs of notice and administration, (b) any incentive payments awarded to Consumer Plaintiffs, and (c) 100% of valid and timely filed claims, monies remain in the Consumer Settlement Fund, any such remaining amount shall be paid to the TPP Settlement Fund, to the extent 100% of valid and timely filed Claims by TFP members of the TPP Settlement Classes remain unpaid.

c. **The Third Party Payer Settlement Fund.** Seventy-five percent (75%) of the Net Settlement Fund, the "Third Party Payer Settlement Fund," shall be set aside to pay notice and administration costs of the Third Party Payer Settlement Fund and incentive payments awarded to TPP Plaintiffs, if any, with the balance of the Third Party Payer Settlement Fund to be paid to satisfy the claims of TPP members of the IPP Settlement Classes who file timely and valid Proofs of Claim. Payments to TPP members of the IPP Settlement Classes will be based on the total amount of Terazosin Product purchases made in the 18 class states submitted in timely and valid TPP Proofs of Claim. If the total amount of Terazosin Product purchases made in the 18 class states claimed by TPPs exceeds the amount available for distribution to TPP members of the IPP Settlement Classes, said members will receive their pro rata share of the TPP Settlement Fund. If, after payment of (a) Court-approved costs of notice and administration, (b) any incentive payments awarded to TPP Plaintiffs, and (c) 100% of valid and timely filed claims, monies remain in the TPP Settlement Fund, any such remaining amount shall be paid to the Consumer Settlement Fund, to the extent 100% of valid and timely filed claims by Consumer members of the IPP Settlement Classes remain unpaid.

d. Distribution of Amounts Not Claimed. If, after payment of all (a) Court-approved costs of notice and administration for the Consumer Settlement Fund and the TPP Settlement Fund, (b) any incentive payments awarded to Consumer Plaintiffs and TPP Plaintiffs, and (c) 100% of valid and timely filed claims of Consumers and TPP, monies remain in either the Consumer Settlement Fund or the TPP Settlement Fund, the remaining amounts in either or both Settlement Funds shall be distributed as ordered by the Court.

e. Settlement Termination Contingency. Under certain circumstances relating, among other things, to Consumer and TPP class members who or which timely and validly exclude themselves from the IPP Settlement Classes, Defendants may terminate the Settlement, in which case the litigation will continue.

f. Release and Discharge of Claims. If the Settlement is finally approved by the Court and becomes effective, members of the IPP Settlement Classes who have not made valid and timely elections to exclude themselves from the IPP Settlement Classes, as well as their respective past, present and future directors, officers, employees, shareholders, attorneys, heirs, executors, administrators, general or limited partners, affiliates, divisions, agents, representatives, predecessors, parents, subsidiaries, agencies, departments, institutions, successors and assigns ("Releasors"), will unconditionally, fully and finally release and discharge forever the Defendants and their respective past, present and future directors, officers, employees, shareholders, affiliates, divisions, agents, representatives, attorneys, heirs, executors, administrators, predecessors, parents. subsidiaries, general or limited partners, successors, and assigns ("Releasees") of all claims, demands, debts, obligations, damages, civil penalties, whenever and wherever incurred, liabilities of any nature whatsoever (including costs, expenses, penalties and attorneys' fees), actions, suits, proceedings, assertions, and causes of action ("Claims"), known or unknown,

suspected or unsuspected, in law or inequity of any jurisdiction, including but not limited to Claims arising under any federal or state antitrust, unfair methods of competition, or consumer protection laws, under any state or federal deceptive practices acts, or under the common laws (including any theory of unjust enrichment) of any jurisdictions, whether accrued in whole or in part of any kind whatsoever, from the beginning of time through the date this Settlement Agreement is preliminarily approved by the Court, which any Releaser had, has, or may have in the future, directly, representatively, derivatively, or in any other capacity against any Releasee that were or could have been asserted by any Releasor (i) arising out of or concerning the allegations, or the facts and circumstances giving rise to the allegations in the Complaints or in any action consolidated as part of MDL No. 1317, or (ii) otherwise relating to any alleged delay in marketing or selling of generic equivalents of Terazosin Products, regardless of whether such claim was raised in the Complaints. Released Claims shall not be construed to include: (1) claims arising solely from and asserting damages based solely on an alleged physical injury; or (2) claims that may be asserted by any Releasor that do not arise from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth in the Complaints, or in any other complaint filed in any action that has been consolidated or coordinated with any of the Complaints, such as claims relating to the "best price" or "average wholesale price" reporting practices or to health care or Medicaid fraud or abuse.

Moreover, if the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes will also be deemed to have expressly waived, released and forever discharged any and all provisions, rights and benefits that may be available under Section 1542 of the California Civil Code (**"Section 1542"**), which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor"; or under any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to Section 1542 (each a **"Comparable Law"**). Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true, but each Releasor hereby expressly waives and fully, finally and forever settles and releases, upon the Effective Date, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Releasor also hereby expressly waives and fully, finally and forever settles and releases any and all claims it may have against any Released Party under California's Unfair Competition Law, § 17200, *et seq.*, of the California Business and Professions Code or any similar, comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims arc hereby expressly incorporated into the definition of Released Claims.

If the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes shall look solely to the Consumer Settlement Fund or the Third Party Payer Settlement Fund, as appropriate, for settlement with and satisfaction of all claims that are released under the Settlement Agreement. Except as provided by order of the Court, no such member of the IPP Settlement Classes shall have any interest in either the Consumer Settlement Fund or the Third Party Payer Settlement Fund or any portion thereof.

V. COUNSEL FOR IPP SETTLEMENT CLASSES AND PLAINTIFF STATES

IPPs' Co-Lead Counsel, who prosecuted these actions and negotiated the Settlement Agreement with the Defendants on behalf of the members of the IPP Settlement Classes are:

Stephen Lowey, Esq.
Richard W. Cohen, Esq.
Geoffrey M. Horn, Esq.
Lowey Dannenberg
Bemporad & Selinger, P.C.
The Gateway, 11th Floor
One North Lexington Ave.
White Plains, NY 10601

Kimberly West, Esq.
Wallace Jordan Ratliff &
Brandt, LLC
800 Shades Creek Parkway
Suite 400
Birmingham, Alabama 35209

Michael Hausfeld, Esq.
Daniel Small, Esq.
1100 New York Ave. N.W.
West Tower, Suite 500
Washington, DC 20005

State Liaison Counsel, who prosecuted these actions and negotiated the Settlement Agreement with the Defendants on behalf of the Plaintiff States is:

Patricia Conners, Esq.
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050

VI. THE SETTLEMENT HEARING

The Court has scheduled a hearing to be held at _____.m. on **June 27, 2005**, at the United States Courthouse, Courtroom 5, 301 North Miami Avenue, 5th Floor, Miami, Florida 33128, to consider whether to approve the terms of the Settlement, the Consumer Distribution Plan and the Third Party Payer Distribution Plan, and the applications for fees and costs and for incentive awards. Although you may attend this hearing in person or through your own attorney, you are not required to do so. If you

wish to comment in support of, or in opposition to, the Settlement, you may do so, but you must mail your comments or objections in writing ***on or before April 11, 2005***, giving your name and current address. If you wish to be heard at the hearing in person or through your own attorney, you or your attorney must mail a written notice of appearance ***on or before April 11, 2005***. Any objections or notices of appearance must be mailed to: (1) The Settlement Administrator at In re Terazosin Hydrochloride Antitrust Litigation, c/o Complete Claim Solutions, Inc., P.O. Box 24607, West Palm Beach, FL 33416; (2) IPPs' Co-Lead Counsel listed in Section V above; and (3) Defendants at both addresses below:

Jeffrey I. Weinberger, Esq.
Stuart N. Senator, Esq.
Munger, Tolles & Olson, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Counsel for Defendant Abbott Laboratories

Wayne A. Cross, Esq.
Paul Olszowka, Esq.
White & Case
1155 Avenue of the Americas
New York, NY 10036
Counsel for Defendant Geneva Pharmaceuticals, Inc. (Sandoz Inc.)

VII. PROOFS OF CLAIM

In order to share in the proceeds of the Settlement and to receive a portion of the Net Settlement Fund, Third Party Payer members of the IPP Settlement Classes are required to complete (providing all requested information) and certify a Proof of Claim on the form accompanying this Notice, and mail it via first-class mail to the following address, ***postmarked no later than July 15, 2005***:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claim Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

VIII. YOUR RIGHT TO BE EXCLUDED FROM THE SETTLEMENT

(1) Any Third Party Payer member of the IPP Settlement Classes that wishes to be excluded from the Settlement for any reason is entitled to do so. The accompanying Third Party Payer Notice of Exclusion Form is provided for this purpose. **In order to be considered timely, it must be *received on or before April 11, 2005*, and mailed by first-class mail to:**

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claim Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

Any member of the IPP Settlement Classes that elects to be excluded from the Settlement will not be entitled to participate in distributions from the Net Settlement Fund or in the Settlement generally, but will retain such rights, if any, it may have to prosecute separate litigation against Defendants at its own expense.

(2) Because of the settlement termination contingencies described in Section IV above, any member of the IPP Settlement Classes that elects to be excluded from the Settlement (an "Opt Out") will be requested to provide information concerning purchases of Terazosin Products. Failure to do so, or failure to provide information sufficient for the parties to determine what effect, if any, the Opt-Out's exclusion has on the termination contingencies may subject the Opt-Out to discovery via subpoena or other legal process.

IX. ADDITIONAL INFORMATION

You may review the Settlement Agreement and the Third Party Payer Distribution Plan during normal business hours at the office of the Clerk of Court, United States District Court for the Southern District of Florida, 301 North Miami Avenue, Room 150, Miami, Florida

33128. If you desire additional information, you may also write any of the IPPs' Co-Lead Counsel listed above in Section V, or telephone the Settlement Administrator at (877) 886-0283 or you may visit the website www.terazosirtlitigation.com.

PLEASE DO NOT CONTACT THE COURT, THE CLERK'S OFFICE, OR COUNSEL FOR DEFENDANTS FOR ADDITIONAL INFORMATION.

Dated: March 7, 2005

BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THIRD PARTY PAYER EXCLUSION FORM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: TERAZOSIN HYDROCHLORIDE)
ANTITRUST LITIGATION)
)

CASE NO. 99-MDL-1317-SEITZ/KLEIN

THIRD PARTY PAYER REQUEST FOR EXCLUSION

Third Party Payers that wish to be excluded from the IPP Settlement Classes must complete the following form and send it by first-class mail in time to be received no later than April 11, 2005 at the following address:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

A SEPARATE NOTICE OF EXCLUSION MUST BE FILED BY EACH CLASS MEMBER ELECTING TO BE EXCLUDED FROM THE CLASSES. If a Notice of Exclusion is filed on behalf of a Third Party Payer member of the IPP Classes by anyone other than a duly authorized officer, director, partner or employee of a Third Party Payer member of the IPP Classes, the Notice of Exclusion must be accompanied by written evidence, in addition to the Certification below, of such person's authority to request exclusion on behalf of that Class Member.

In order to elect to be excluded from the IPP Classes, you must provide the following information and complete the Certification:

1. Name of TPP Class Member[1]:

_____

2. TPP Class Member's Address: _____

_____

3. TPP Class Member Tax Identification Number ("FEIN")[2]:

Certification

The undersigned individual represents that he/she has the authority to sign end submit this Notice of Exclusion on behalf of the above-named Class Member. If the undersigned individual is not a duly authorized officer, director, or employee of the above-named Class Member (if a corporation), or a general partner or duly authorized employee of the above-named Class Member (if a partnership), he/she must attach written evidence of the Class Member's grant of authority to him/her to execute this Notice of Exclusion on its behalf.

The undersigned also certifies that he/she has not received any advice from the parties to this litigation concerning his/her or the Class Member's fiduciary obligations under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1100, *et seq.*, or other laws governing their obligations to any Class Member. The undersigned understands that by submitting this Notice of Exclusion, the Class Member identified above will not be bound by any further ruling of the Court and will not share in the Settlement. By affixing my signature below, I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

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[1] Please include all names by which Class Member has been known since October 15, 1995.

[2] Please include all FEINs assigned to Class Member since October 15, 1995.

Name: _____

Legal Relationship to Class Member: _____

Contact/Telephone Number: _____

Signature: _____ Executed on: _____

The Parties request that each Third Party Payer Class Member electing exclusion from the Classes provide the following information: Amounts paid[3] in each of the 18 states for Hytrin® and/or generic terazosin hydrochloride during the period January 1, 1998, to December 31, 1999, based on records maintained by the Class Member:

THE INFORMATION PROVIDED WILL BE TREATED AS CONFIDENTIAL BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND WILL BE USED SOLELY FOR PURPOSES OF ADMINISTERING THIS ACTION.

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[3] "Amounts paid" includes the total amount paid by the Third Party Payer members of the IPP Classes for Hytrin® and/or generic terazosin hydrochloride, whether paid directly to a pharmacy, through reimbursement to an insured, or otherwise. Third Party Payers may submit this information in an electronic format acceptable to the Settlement Administrator. For more information concerning the submission of electronic data, please contact the Settlement Administrator, Complete Claim Solutions, Inc., at the address and telephone number provided in the Notice.

Alabama:	California:	Florida:	Illinois:
Kansas:	Maine:	Michigan:	Minnesota:
Mississippi:	Nevada:	New Mexico:	New York:
North Carolina:	North Dakota:	South Dakota:	Tennessee:
West Virginia:	Wisconsin:		

Signature:_____ Date:_____

Print Name:_____ Title:_____

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416
1-877-886-0283
www.terazosinlitigation.com

IMPORTANT COURT DOCUMENTS

THIRD PARTY PAYER PROOF OF CLAIM FORM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: TERAZOSIN HYDROCHLORIDE)
ANTITRUST LITIGATION)
)

CASE NO. 99-MDL-1317-SEITZ/KLEIN

THIRD PARTY PAYER PROOF OF CLAIM FORM INSTRUCTIONS

IMPORTANT NOTICE: IN ORDER FOR THE THIRD PARTY PAYER ("TPP") CLASS MEMBER TO RECEIVE ITS SHARE OF THE TPP SETTLEMENT FUND, PURSUANT TO THE ALLOCATION AND DISTRIBUTION PLAN DESCRIBED IN THE NOTICE, A COMPLETED, SIGNED, AND CERTIFIED PROOF OF CLAIM MUST BE RECEIVED BY THE SETTLEMENT ADMINISTRATOR, AT THE ADDRESS LISTED BELOW:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416
1-877-886-0283

IF YOUR COMPLETED, SIGNED CLAIM FORM IS NOT MAILED BY FIRST-CLASS MAIL, POSTAGE PREPAID, AND POSTMARKED BY JULY 15, 2005, YOU WILL NOT BE ALLOWED TO PARTICIPATE IN THE SETTLEMENT DISTRIBUTION.

THE COMPLETED CLAIM FORM AND THE INFORMATION CONTAINED HEREIN WILL BE TREATED AS CONFIDENTIAL BY ORDER OF THE COURT AND

WILL. BE USED SOLELY FOR PURPOSES OF ADMINISTERING THIS SETTLEMENT.

A Class Member must be a "Third Party Payer" or "TPP," which, for these purposes, means an entity that is (1) a party to a contract, issuer of a policy or sponsor of a plan, and is also (2) at risk, pursuant to such contract, policy or plan, to provide prescription drug benefits, or to pay or reimburse all or part of the cost of Terazosin Products dispensed to natural persons covered by such contract, policy or plan. Entities with self-funded plans that contract with a health insurance company or other entity to serve as a third party claims administrator to administer their prescription drug benefits may qualify as TPPs. If such an entity's contract with its claims administrator does not shift the financial risk for the purchase of Terazosin Products from the entity to its claims administrator or otherwise assign the entity's rights in any recovery under this Settlement to its claims administrator, the entity with the self-funded plan (rather than the claims administrator) will be a TPP for purposes of this Settlement. Entities with self-funded plans should also be aware that any agreements that they may have with third party claims administrators may affect their ability to, or the terms under which such entities may, assert any claim against the TPP Settlement Fund, as well as the amount of any recovery to which such entity may be entitled. Entities with self-funded plans that maintain such contractual arrangements with third party claims administrators should review the terms of their administrative services agreements before making any claim against the TPP Settlement Fund to determine whether the entity or its third party claims administrator possesses the claim and/or has the right or obligation to assert the claim or the right to any or all proceeds that may be paid on the claim.

This Proof of Claim may be completed, signed and certified by the Class Member itself, or by its duly authorized agent. IF A CLASS MEMBER SUBMITS A PROOF OF CLAIM ON ITS OWN BEHALF, NO OTHER PROOF OF

CLAIM WILL BE PERMITTED ON BEHALF OF THAT CLASS MEMBER. IN THE EVENT THAT PROOFS OF CLAIM ARE FILED BY BOTH A CLASS MEMBER AND ANOTHER ENTITY THAT PURPORTS TO BE THE AUTHORIZED AGENT OP THAT CLASS MEMBER, ONLY THE CLASS MEMBER'S PROOF OF CLAIM WILL BE CONSIDERED BY THE SETTLEMENT ADMINISTRATOR. **THE SETTLEMENT ADMINISTRATOR IS AUTHORIZED TO REQUEST FROM PERSONS OR ENTITIES SUBMITTING PROOFS OF CLAIM, ANY DOCUMENTATION NECESSARY TO VERIFY ALL INFORMATION APPEARING IN THE PROOF OF CLAIM OR TO PREVENT CONSIDERATION OF DUPLICATE CLAIMS SUBMITTED BY OR ON BEHALF OF A CLASS MEMBER. FAILURE TO PROVIDE SUCH INFORMATION IN RESPONSE TO SUCH REQUEST MAY CONSTITUTE GROUNDS FOR REJECTION OF THE PROOF OF CLAIM.**

If one or more Class Members has authorized you to submit a Proof of Claim on its or their behalf, you must provide the information requested in Section C in addition to the information requested by this Proof of Claim. You may submit a separate Proof of Claim for all each Class Member that has duly authorized you to do so, OR you may submit one aggregate Proof of Claim for all such Class Members that have authorized you to do so. If you are submitting Proofs of Claim both on your own behalf as a Class Member AND on behalf of one or more Class Members that has authorized you to submit a Proof of Claim, you should submit one Proof of Claim for yourself and another Proof of Claim for the other Class Member(s). **Do not submit a Proof of Claim on behalf of any Class Member without specific prior authorization from that Class Member.**

If after reviewing this Proof of Claim you need additional assistance, you may contact the Settlement Administrator at the toll-free number listed above.

THIRD PARTY PAYER PROOF OF CLAIM FORM

SECTION A – Type of Claimant: Please indicate whether you are claiming on your own behalf as a Class Member or as the authorized agent of one or more Class Members by placing an "X" in the appropriate space below. Only one space should be marked. **If you wish to make a claim as a Class Member AND ALSO as the authorized agent of other Class Members, please complete one Proof of Claim for your claim as a Class Member and another Proof of Claim for those Class Members for whom you are authorized to submit a claim.**

This Proof of Claim is being filed by: (select one)

A. (_____) The Class Member, itself.

B. The duly authorized agent of the Class Member(s) identified in Section C of this Proof of Claim, which agent's relationship with the Class Member(s) is best described, as follows:

(_____) Third Party Administrator (other than a Pharmacy Benefits Manager)

(_____) Pharmacy Benefits Manager

(_____) Other. Explain:_____

If you marked "A," complete Sections B, D and E of this Proof of Claim, but skip Section C. If you marked "B," complete Sections C, D and E of this Proof Claim, but skip Section B.

SECTION B – Claim by Class Member: You should complete this Section B if you are making a claim on your own behalf as a Class Member. If you are making a claim as the authorized agent of one or more Class Members, you should skip this section and proceed to Section C.

Class Member's Name

Street Address Floor/Suite

City State Zip Code

(____)_____ (____)_____

Area Code – Telephone No. Area Code – Fax No.

FEIN

Any other names by which you have been known or other FEINs you have used to pay prescription drug benefits from January 1, 1998 - December 31, 2004:

Check the term below that best describes your company/entity:

(_____) Health Insurance Company/HMO

(_____) Self-Insured Employer Health Benefit Plan

(_____) Self-Insured Union Health & Welfare Fund

(_____) Other. Describe:_____

If another entity, such as a Third Party Administrator or Pharmacy Benefits Manager, made payments or reimbursements on your behalf for Terazosin Products during the period from January 1, 1998 - December 31, 2004, provide the following information for each of those entities:

Name of Entity Making Payments for Terazosin Products on Your Behalf

Street Address Floor/Suite

City State Zip Code

( ) ( )
Area Code – Telephone No. Area Code – Fax No.

FEIN

SECTION C – Claim by Authorized Agent of Class Member(s): You should complete this Section C if you are submitting this Proof of Claim as the duly authorized agent of one or more Class Members.

Authorized Agent's Name

Street Address Floor/Suite

City State Zip Code

( ) ( )
Area Code – Telephone No. Area Code – Fax No.

FEIN

Please identify every Class Member for whom you have beat duly authorized to submit this Proof of Claim (attach additional sheets to this Proof of Claim as necessary). (In the alternative, you may submit such identification information in an acceptable electronic format. Please contact the Settlement Administrator to determine what formats are acceptable.):

_____ _____

_____ _____

_____ _____

SECTION D – Information Necessary to Calculate Class Member(s)' Claim:

Amounts paid or reimbursed for prescriptions of Hytrin and its AB-rated equivalents filled during the period January 1, 1998 through December 31, 2004, in the following states:

Alabama:	California:	Florida:	Illinois:
Kansas:	Maine:	Michigan:	Minnesota:
Mississippi:	Nevada:	New Mexico:	New York:
North Carolina:	North Dakota:	South Dakota:	Tennessee:
West Virginia:	Wisconsin:		

Claimant certifies that the figures submitted are true and accurate and based upon actual records maintained by or otherwise available to the Claimant.

SECTION E – Jurisdiction of the Court and Certification: By signing below, I hereby swear or affirm, on my own behalf and/or on behalf of the "Authorized Agent," that: (1) I have been given authority to submit this Proof of Claim either (a) by the Class Member on its behalf, or (b) if this Proof of Claim is submitted by an "Authorized Agent," by the Authorized Agent on its behalf, and such Authorized Agent, in turn, has been given the authority to submit this Proof of Claim by each Class Member identified in this Proof of Claim and in any attachments to this Proof of Claim, and to receive on behalf of each such Class

Member any and all amounts that may be allocated from the TPP Settlement Fund to such Class Member; (2) the information contained in this Proof of Claim and any attachments hereto is true and accurate, based on records maintained by or otherwise available to me; (3) I, the Authorized Agent (if any), and each Class Member on whose behalf this Proof of Claim is submitted, hereby submits to the jurisdiction of the United States District Court for the Southern District of Florida (the "Court") for all purposes associated with this Proof of Claim, including resolution of disputes relating to this Proof of Claim; (4) in the event that amounts from the TPP Settlement Fund are distributed to the Authorized Agent of a Class Member, and the Class Member later claims that the Authorized Agent did not have the authority to claim and receive such amounts on its behalf, the Authorized Agent, I and/or my employer will hold the Class, counsel for the Class, and the Settlement Administrator harmless with respect to any claims made by said Class Member. I acknowledge that any false information or representations contained herein may subject the Authorized Agent and me to sanctions, including the possibility of criminal prosecution. I hereby agree, on behalf of myself and the Authorized Agent, to supplement this Proof of Claim by furnishing documentary backup for the information provided herein, upon request of the Settlement Administrator.

SECTION F – ACKNOWLEDGMENT OF RELEASE OF CLAIMS: By signing below, I acknowledge that, if the Settlement is finally approved by the Court and becomes effective, members of the IPP Settlement Classes who have not made valid and timely elections to exclude themselves from the IPP Settlement Classes, whether or not they object to the Settlement Agreement and whether or not they make a claim upon or participate in any Settlement Fund (including both TPPs and Consumers, whether IPPs or not), as well as their respective past, present and future directors, officers, insurers, employees, shareholders, agents, attorneys, trustees, associates, gen-

eral or limited partners, affiliates, divisions, agents, representatives, predecessors, parents, subsidiaries, agencies, departments, institutions, successors and assigns ("Releasers"), will unconditionally, fully and finally release and discharge forever the Defendants and their respective past, present and future directors, officers, employees, agents, attorneys, shareholders, affiliates, divisions, agents, representatives, parents, subsidiaries, general or limited partners, insurers, and the predecessors, heirs, executors, administrators, successors, and assigns of each of the foregoing ("Releasees") of all claims, demands, debts, obligations, damages, civil penalties, whenever and wherever incurred, liabilities of any nature whatsoever (including costs, expenses, penalties and attorneys' fees), actions, suits, proceedings, assertions, and causes of action ("Claims"), known or unknown, suspected or unsuspected, in law or in equity of any jurisdiction, including but not limited to Claims arising under any federal or state antitrust, unfair methods of competition, or consumer protection laws, under any state or federal deceptive practices acts, or under the common laws (including any theory of unjust enrichment) of any jurisdictions, whether accrued in whole or in part of any kind whatsoever, from the beginning of time through the date this Settlement Agreement is preliminarily approved by the Court, which any Releasor had, has, or may have in the future, directly, representatively, derivatively, or in any other capacity against any Releasee (i) arising out of or concerning the allegations, or the facts and circumstances giving rise to the allegations in the Complaints or in any other complaint filed, consolidated or coordinated in MDL No. 1317, or (ii) otherwise relating to any alleged delay in marketing or selling of generic equivalents of Terazosin Products, regardless of whether such claim was raised in the Complaints. Released Claims shall not be construed to include: (1) claims arising solely from and asserting damages based solely on an alleged physical injury; or (2) claims that may be asserted by any Releaser relating to the "best price" or "average wholesale price" reporting

practices, or to health care or Medicaid fraud or abuse, except to the extent that such claims arise from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth in the Complaints, or in any other complaint filed in any action that has been consolidated or coordinated with any of the Complaints.

Moreover, if the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes will also be deemed to have expressly waived, released and forever discharged any and all provisions, rights and benefits that may he available under Section 1542 of the California Civil Code (**"Section 1542"**), which provides: **"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor"**; or under any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to Section 1542 (each a **"Comparable Law"**). Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true, but each Releasor hereby expressly waives and fully, finally and forever settles and releases, upon the Effective Date, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Releaser also hereby expressly waives and fully, finally and forever settles and releases any and all claims it may have against any Released Party under California's Unfair Competition Law, § 17200, *et seq.*, of the California Business and Professions Code, or any similar, compara-

ble or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are hereby expressly incorporated into the definition of Released Claims.

Name:_____ Position:_____
[Print or type]

Signature:_____ Date:_____

The following information is to be provided by the Individual that signs and certifies this Proof of Claim:

I am filing this Proof of Claim as the authorized employee of the following Class Member or Authorized Agent for Class Member:

1. _____
Name of Individual's Employer

2. _____
Business Address

_____
City State Zip Code

3. (___)_____
Area Code – Telephone No.

_____
Area Code – Fax No.

4. _____
E-mail address

NOTARIZATION OF CLAIMANT'S SIGNATURE:

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared _____, who being known to me and being by me first duly sworn, deposed and testified as set forth above.

Sworn to and subscribed to before me this _____ day of _____, 200_.

_____
Notary Public

My commission expires:_____

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 6(b) provides:

Rule 6. Time

* * * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

* * * * *

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 28, 2006

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Blue Cross Blue Shield of Florida, Inc., et al.
v. Abbott Laboratories, et al.
Application No. 06A222

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on August 28, 2006 extended the time to and including October 5, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ HEATHER TRANT
Heather Trant
Case Analyst

[attached notification list omitted]

Supreme Court, U.S.
FILED
DEC 4 - 2006
OFFICE OF THE CLERK

(3)

No. 06-475

IN THE

Supreme Court of the United States

BLUE CROSS BLUE SHIELD OF FLORIDA, INC., *et al.*,

Petitioners,

v.

ABBOTT LABORATORIES, and
GENEVA PHARMACEUTICALS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Counsel for Respondent Abbott Laboratories

* *Counsel of Record*

CORPORATE DISCLOSURE STATEMENT

Respondent Abbott Laboratories has no parent corporation and no publicly-held company owns 10% or more of its stock.

Respondent Geneva Pharmaceuticals, Inc. (now known as Sandoz Inc.) ("Geneva") states that Novartis AG is the only company directly or indirectly affiliated with Geneva that has outstanding securities in the hands of the public.

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INTRODUCTION

Petitioners mailed their requests to opt out of a class settlement on Thursday, April 7, 2005, at 11:06 p.m. The deadline for the claims administrator's receipt of the opt-out requests, one thousand miles away, was Monday, April 11, 2005. Petitioners, moreover, used ordinary mail rather than Priority Mail. Not surprisingly, Petitioners' opt-out requests were received after the deadline.

Because Petitioners requested postal return receipts, they quickly received notice of their untimeliness. Yet Petitioners did not promptly seek relief from the deadline. Only when the claims administrator reported to the district court, two months later, that Petitioners' requests were untimely did Petitioners move the district court for leave to opt out late.

The district court asked Petitioners to explain why they waited until the last minute to mail their opt-out requests. Petitioners first responded that they needed the time to compile purchase data that was allegedly "required" to be submitted with the opt-out requests. But the evidence showed that it was crystal clear to Petitioners and their counsel that the data at issue was *not* required. Further, Petitioners failed to introduce any evidence that the data they did submit could not have been compiled earlier. Petitioners have now dropped any argument that they were justified in waiting until the eleventh hour to mail their opt-out requests.

The district court found that it "could reasonably conclude that the [Petitioners] waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the [class] settlement on April 11, 2005, based on their exclusions." In other words, the delay in mailing appeared to be a deliberate, strategic choice.

On this record — devoid of any evidence of diligence or good faith by Petitioners or any legitimate explanation for Petitioners' delay in mailing — and applying the excusable neglect analysis outlined in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), the district court in its discretion declined to grant Petitioners leave to opt out late. In an unpublished order, the Court of Appeals for the Eleventh Circuit summarily affirmed the district court's exercise of its discretion.

In now seeking *certiorari* from this unremarkable summary affirmance of an unremarkable exercise of discretion, Petitioners cite illusory "circuit splits" on the excusable neglect standard. Petitioners' own descriptions of the cases, however, make clear that the supposed circuit splits in reality are no more than courts applying *agreed-upon* legal principles to different factual scenarios and, therefore, reaching different outcomes. Indeed, the court of appeals' decision here was an unpublished summary affirmance; it did not enunciate any new legal principles.

For example, Petitioners claim a circuit split on what constitutes prejudice under *Pioneer*. But Petitioners' cases on one side of the supposed "split" involve motions for relief from default judgments, and the cases on the other side involve class opt-out and claim deadlines. Courts applying the *Pioneer* analysis properly focus first and foremost on the nature of the omission and the relief sought. The prejudice caused by ignoring a class opt-out or claim deadline negotiated as part of a settlement is very different from the prejudice caused by setting aside a default judgment. There is no inconsistency in the lower courts' treatment of the two situations.

Similarly, there is no circuit split on whether purported delays in the mail can constitute excusable neglect. The lower courts agree that missed deadlines attributable to the ordinary vagaries of the mail do not constitute excusable neglect. The cases cited by Petitioners in support of their supposed "split"

all involve extraordinary circumstances where documents were mailed far enough in advance to be received in the ordinary course but were delayed by storms or lost in the postal system. Many of the cases involve mail that took many days to travel very short distances. This case does not involve a storm, lost mail, or mail taking many days to travel a very short distance. This case involves mail which was simply sent too late to guarantee delivery by an imminent deadline.

Even if Petitioners' imagined circuit splits existed, this case would not be appropriate for *certiorari*. The decision below was based on indisputable and unchallenged factual findings that clearly support the result, regardless of the nuances of the lower courts' decisions applying *Pioneer*. The district court relied upon the Petitioners' mailing their opt-out requests at the last minute, their failure to explain their lack of diligence, and the absence of any evidence of good faith.

COUNTER-STATEMENT OF THE CASE

A. MDL Litigation Background.

This petition is taken from indirect purchaser antitrust class actions that, together with direct purchaser class and individual actions, was consolidated by the Judicial Panel on Multi-District Litigation under the caption *In re Terazosin Hydrochloride Antitrust Litigation*, MDL No. 1317 (S.D. Fla.). That litigation challenged a patent settlement between Defendants relating to the prescription drug Hytrin® and its generic alternative, terazosin hydrochloride.[1]

---

[1] Petitioners describe the *allegations* in the Federal Trade Commission's complaint challenging Defendants' patent settlement. *See* Petition at 5-6 ("According to the FTC..."). No judicial or administrative *determinations* are discussed, however, and the allegations discussed are incomplete and misleading. Because the FTC's allegations are irrelevant to the issues here, Defendants do not address

(Cont'd)

In April 2004, the district court certified indirect purchaser classes including both consumers and third-party payors ("TPPs") of medical expenses. Petitioners are seven insurance companies who are TPP members of the certified classes. Along with eight other insurance companies, Petitioners are part of the "Illinois TPP" plaintiff group, who joined together to file a duplicative action in Illinois state court.

Defendants filed a petition for leave to appeal the class certification order under Federal Rule of Civil Procedure 23(f). The Eleventh Circuit granted leave. *See* Eleventh Circuit Appeal No. 04-12761-D. That appeal challenged, *inter alia*, the ability of TPPs (like Petitioners here) to recover alleged overcharges on pharmaceuticals given that the TPPs pass on any overcharge to their insureds.

In mid-February 2005, the parties informed the district court that they had reached a global settlement of the MDL cases. The global settlement included separate agreements with the direct class, the indirect classes, and all non-class plaintiffs save one. The Rule 23(f) appeal was to be voluntarily dismissed as part of the MDL settlement.

The one MDL party who did not settle was Kaiser Foundation Health Plan, Inc., also represented by Petitioners' counsel. The *Kaiser* action was remanded to the Central District of California for trial. At trial in March 2006, the jury returned a defense verdict, finding that Defendants' patent settlement did not cause any harm.[2]

(Cont'd)

them at length. A description of the underlying facts of the MDL litigation can be found in *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1298-03 (11th Cir. 2003).

[2] Kaiser's appeal from the verdict is pending in the Ninth Circuit. *See Kaiser Foundation v. Abbott Laboratories*, U.S. Court of Appeals for Ninth Circuit, No. 06-55687.

The district court gave final approval to the indirect purchaser settlement on June 29, 2005, at the end of a two-day hearing, finding the settlement to be fair, reasonable, and adequate. *See* Doc. 1632,[3] Transcript (June 29, 2005) at 113:13-114:20. The district court memorialized its order in a written opinion dated July 8, 2005. Petitioners did not object to the settlement.[4]

B. Requests to Opt Out of the Settlement Had To Be Received by the Claims Administrator by April 11, 2005.

Under the terms of the indirect purchaser settlement agreement, opt-out requests had to be received by the claims administrator in West Palm Beach, Florida by Monday, April 11, 2005. This deadline was clearly and prominently explained on the opt-out forms.[5] *See* Pet. App. at 46a-48a.

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[3] "Doc." refers to the entries in the district court's docket.

[4] Petitioners sought permission to submit late objections on June 30, 2005, the day *after* the hearing at which the district court announced its final approval of the settlement. *See* Doc. 1600. The motion for late objections did not itself contain any objections and was denied. *See* Pet. App. at 14a. Petitioners filed but then voluntarily dismissed an appeal from this denial and from the final approval order. *See* Doc. 1639.

[5] There is no merit to Petitioners' suggestion that the opt-out deadline was ambiguous and could be read to mean not receipt by April 11, 2005 but instead mailing "in time to be received" by April 11, 2005. First, Petitioners have never claimed – much less submitted evidence – that they actually relied on this creative reading of the opt-out form. To the contrary, Petitioners' initial papers to the district court, for example, acknowledge their understanding that the deadline was for receipt by April 11, 2005. *See* Doc. 1580 at 1; Doc. 1602 at 2. Second, Petitioners did not argue to the district court that there was any ambiguity in the opt-out notice. *See id.* Finally, the argument is irrelevant because Petitioners' opt outs were obviously not sent in time to be received by April 11, 2005.

The opt-out form for the indirect purchaser settlement requested — but did not require — that TPPs list the amounts paid for Defendants' products in each class state. *See* Pet. App. at 50a.

The district court found that the April 11 deadline was a "vigorous[ly] negotiat[ed]" provision of the settlement agreement. *See* Pet. App. at 8a. The April 11 deadline was tied to Defendants' deadline to terminate the *direct* purchaser settlement based on TPP opt outs from the indirect purchaser settlement.[6] *See* Doc. 1524, Exh. A at 12. The district court specifically noted this linkage and the very limited time Defendants had to evaluate TPP opt outs under the schedules negotiated by the parties. *See* Doc. 1532, Transcript (Mar. 2, 2005) at 26:8-29:2.

Petitioners claim to this Court that Rider A to the settlement agreement has some relevance to this appeal. This is a red herring. Petitioners admit that they were invited to file a motion with the district court regarding the relevance of Rider A. *See* Pet. at 14. Petitioners never filed such a motion and have never argued to the district court — the court most knowledgeable about the settlement of this litigation — that Rider A has any particular relevance to the opt-out issues.

C. Petitioner Waited Until the Last Minute to Mail Their Opt-Out Requests.

Petitioners were well placed to submit any opt-out requests in a timely manner. Petitioners had advance notice of the settlement and the April 11 opt-out deadline because their counsel was also counsel to Kaiser, an individual plaintiff in

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[6] Petitioners emphasize Defendants' May 9, 2005 deadline to terminate the indirect purchaser settlement. But Defendants desired only a global settlement, and the April 11 deadline for TPP opt outs was linked to Defendants' deadline to terminate the *direct* purchaser class settlement.

the MDL proceedings. *See* App. at 6a. Petitioners admit that they also knew well in advance of the settlement that the opt-out forms would request employer identification numbers (EINs) and purchase data, "based on common practice in class action settlement opt-outs." *See* Doc. 1602, Exh. 4 ¶¶ 1, 4. Indeed, Petitioners admitted that they began collecting some of the requested information "as early as January 31, 2004" —*fifteen* months before the opt-out deadline. *See id.* ¶ 4. Petitioners had also already collected, if not thoroughly analyzed, their purchase data by the time of the settlement notice. *See id.* ¶ 10.

Despite the advance notice and preliminary work, Petitioners (and the eight other members of the Illinois TPP group) waited until Thursday, April 7, 2005, at 11:06 p.m., to mail their opt-out requests from Washington, D.C. To compound matters, the district court found, Petitioners chose to use regular mail, rather than the post office's Priority Mail service. Petitioners' claim to have mailed their opt-out forms "four days" in advance of the deadline is highly misleading. The forms were mailed just before midnight on Thursday, and needed to be received on Monday.

Not surprisingly, the opt-out requests of 14 of the 15 Illinois TPPs arrived late. Due to misrepresentations by the Illinois TPPs, however, the district court initially understood that only the seven opt-out requests submitted by Petitioners here were late. Defendants and the district court did not discover until months later that the opt-out forms of seven additional Illinois TPPs were also untimely. The district court granted Defendants' motion to correct the record under Federal Rule of Civil Procedure 60(b) to treat these opt outs as also late. That decision is currently on appeal to the Eleventh Circuit.

D. Petitioners Waited Months to Seek Relief From the Opt-Out Deadline, Blaming the Post Office.

Petitioners claimed not to have known before June 16, 2005, that any of their exclusion forms were received late. *See* Doc. 1580, Exh. A ¶ 8. But Petitioners mailed their opt-out requests "certified, return receipt." *Id.* ¶ 6. The dates stamped on the return receipts, not to mention the postal service's on-line tracking system for certified mail,[7] would promptly have told counsel that the requests had been late. Nonetheless, Petitioners did not seek timely relief from the missed deadline until months later, after the claims administrator submitted a report listing their opt outs as untimely.

Petitioners' motion in the district court criticized the post office for not delivering the mail by the next business day. *See* Doc. 1580 at 2-3. No explanation was offered for the decision to wait until the last minute to mail the opt-out requests. Nor did Petitioners mention the return receipts, much less explain why they had not sought relief in mid-April when they received these documents back from the postal service.

E. Petitioners Then Blamed a Fictitious "Requirement" to Provide Purchase Data.

At the final approval hearing, the district court rejected the Illinois TPPs' effort to "blame the post office department for what counsel should have undertaken in a more responsible manner." *See* Doc. 1631, Transcript (June 28, 2005) at 13:23-14:1.

Petitioners immediately changed tack and insisted that they had needed until April 7 to prepare the state-by-state purchase data "required" by the opt-out forms: "They were mailed on April 7th because . . . . [w]e were required to turn in

[7] The tracking system can be accessed at www.usps.com/cttgate.

documentation showing payments by — state by state." *Id.* at 14:3-19. The record contained no factual support for this assertion. Petitioners had not even mentioned this supposed cause for the delay in their moving papers. *See id.* at 36:4-12; Pet. App. at 6a-7a.

In reality, the opt-out forms did not *require* any purchase information. As the district court recognized, the information was merely *requested* to minimize the possibility of discovery down the road. *See* Pet. App. at 8a & n.6.

The distinction between required and requested data could not have been lost on Petitioners and their counsel. In another similar pharmaceutical antitrust case just a few years earlier, two of the Petitioners represented by the same lead counsel decided not to opt out but to object to the settlement. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 389 & n.29 (D.D.C. 2002). In justifying that decision, Petitioners' lead counsel cited the great burden of opting out given the "requirement" to provide data. *Id.* at 397.

The *Lorazepam* court found that statement "disturbing" and "appalling" because it "grossly misrepresented facts to the Court." *Id. See also id.* at 398 n.42 (other statements by counsel regarding opt outs "ambiguous and disgenuine, if not totally incredible"). As here, it was clear that "the information for opt-outs . . . was requested, not required." *Id.* at 397-98.

F. Opt-Out Requests Without EINs or Purchase Data Were Also Submitted at the Last Minute.

In *Lorazepam*, Petitioners' counsel had submitted other opt-out requests without providing any purchase data, demonstrating actual knowledge that data was not required. *See id.* at 397. The same is true here.

One of the Petitioners, CareFirst, Inc., submitted an opt-out form in this litigation without any of the supposedly "required" purchase data. *See* Doc. 1643, Singla Decl. ¶ 24, Exh. 13. Another Petitioner, Federated Mutual, provided no EINs other than its own. *See id.* ¶ 25, Exh. 14. Petitioners' counsel also represents Kaiser and six related entities in the MDL proceedings in the current litigation. The opt-out forms submitted by these entities also did not contain any of the supposedly "required" purchase data. *See id.* ¶ 23, Exh. 12.

Yet all of these opt-out requests were also mailed at the last minute. The CareFirst and Federated Mutual forms were mailed at 11:06 p.m. on April 7, 2005. The Kaiser forms were mailed on April 6 or 7, 2005 (but managed to arrive on April 11). *See* Doc. 1566, Exh. 6 to Exh. 2.

These opt-out forms demonstrate not only that Petitioners and their counsel knew that purchase data was not required to opt out, but also that *they waited until the last minute to submit opt-out forms even when there was limited or no data to compile or collect.* It was perfectly reasonable for the district court to suspect that the decision to wait until April 7 was not related to the need to compile or collect data.

G. The Decisions Below.

At the final approval hearing, the district court heard testimony and argument on the issue of late opt outs. The court then ruled from the bench and denied Petitioners leave to submit late opt-out forms. *See* Doc. 1632, Transcript (June 29, 2005) at 108:10-109:16. The ruling was reduced to a written order dated July 8, 2005, which was then amended to correct a clerical error on July 14, 2005 (the "Order Regarding Opt-Outs").[8] *See* Pet. App. at 3a – 15a; Doc. 1615.

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[8] The order included in Petitioners' Appendix is the uncorrected July 8 version.

The district court rejected Petitioner's efforts to blame the post office and found no evidence that their opt-out requests had been misrouted or lost in the mail. The court found that that Petitioners had not mailed the opt-out forms far in enough in advance of the deadline for them reasonably to rely on the post office's delivering the forms before the deadline. The court then held that the Petitioners had not established excusable neglect because they had failed to introduce any evidence justifying the failure to mail the exclusion forms before April 7. *See* Pet. App. at 8a-9a. Petitioners had not even provided a credible explanation for waiting until April 7 at almost midnight to mail their opt-out forms.

The district court relied also on Petitioners' failure to exercise reasonable diligence. Petitioners had not used priority mail, a form of first-class mail. *See id.* at 6a n.2. Nor had Petitioners checked with the claims administrator on April 11, or thereafter, to confirm whether their exclusion requests had been timely received and to make any necessary alternative delivery arrangements. *See id.* at 7a n.3.

The district court noted also that Petitioners had introduced no evidence demonstrating their good faith. *See id.* 8a. To the contrary, the district court found that it "could reasonably conclude that the Petitioners waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions."[9] *Id.* (emphasis added).

Petitioners had a clear motive to make sure their opt-outs did not cause Defendants to terminate the settlement; Petitioners wished to avoid a decision in Defendants' pending appeal of

[9] Although the ultimate deadline to terminate the indirect purchaser settlement based on TPP opt-outs was May 9, the April 11 deadline was linked to Defendants' deadline to terminate the direct purchaser class settlement. *See* Doc. 1524, Exh. A at 11-12. As noted, Defendants had previously decided to settle all of the class claims or none of them, and the settlement agreements had reciprocal termination rights.

the indirect purchaser class certification order. If Defendants had obtained the relief they sought in that appeal (a ruling that insurance companies cannot recover alleged overcharges passed on to their insureds), it would have seriously undermined Petitioners' claims. Although Petitioners suggest to this Court that Defendants' pending appeal did not affect their claims (Pet. at 30), the reality is that Petitioners submitted an *amicus* brief in that appeal and explained to the Eleventh Circuit that their pending claims "may be adversely affected by a decision" in Defendants' favor.[10]

Finally, the district court rejected as a factual matter Petitioners' claim (repeated to this Court) that they had previously expressed their intention to opt out of the class settlements. *See* Pet. App. at 8a n.5.

Petitioners then appealed to the United State Court of Appeals for the Eleventh Circuit. On May 3, 2006, the Eleventh Circuit issued an unpublished, *per curium* opinion summarily affirming the district court's ruling in all respects.

REASONS FOR DENYING THE PETITION

I. There Are No Circuit Splits Here.

Petitioners try to invent circuit splits by citing cases that apply well-established and agreed upon legal principles to different sets of facts. But different results on different facts do not create a circuit split.

A. There Is No Circuit Split Regarding the Potential Prejudice From Exemptions to Class Claim or Opt-Out Deadlines.

Courts have found — consistent with the decisions below in this case — that increased litigation exposure resulting from

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[10] *See* Amicus Brief of Putative Class Members, at 1 (Nov. 12, 2004), Eleventh Circuit Appeal No. 04-12761.

the extension of a class opt-out or claim deadlines can constitute prejudice under the Rule 6(b) "excusable neglect" analysis. *See, e.g., Pigford v. Johanns,* 416 F.3d 12, 21-22 (D.C. Cir. 2005) (recognizing prejudice Defendant might suffer from permitting late claims); *In re Diet Drug (Phentermine/ Fenfluramine/Dexfenfluramine) Products Liability Litig.*, 92 Fed.App'x. 890, 893-894 (3rd Cir. 2004) (unpublished) (recognizing that late opt out would prejudice Defendants by requiring them to litigate the class member's claims); *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 204 F.R.D. 6, 14 (D. Mass. 2001) (finding that the "most persuasive [factor] in this case, is the danger of prejudice to the Defendants" if class members permitted to opt-out late and pursue separate actions).[11]

Petitioners claim there is a circuit split on this issue because courts considering motions *to vacate a default judgment* under Rule 60(b)(1) have refused to recognize as prejudice the need to litigate the claim on the merits.[12]

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[11] Petitioners cite one case supposedly to the contrary. Not only did that case pre-date *Pioneer,* but the class member seeking to opt out late was not pursuing claims against the party seeking to enforce the opt-out deadline, changing the prejudice analysis. *See In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289 n.1 (10th Cir. 1974).

[12] Petition at 18-22. *See, e.g., FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835, 836 (D.C. Cir. 2006) (appeal from denial of relief under Rule 60(b) from default judgment); *TCI Group Life Ins. Plan v. Knoebber,* 244 F.3d 691, 695 (9th Cir. 2001) (same); *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000) (same); *Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) (same); *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (same); *Hibernia Nat. Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985). In one case that predates *Pioneer*, the Seventh Circuit suggested in passing that the need to litigate a case on the merits could be cognizable prejudice even in the context of a motion to vacate a default judgment. *See Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983).

This is not a circuit split, but a reflection of the differences between requests to vacate default judgments and requests for relief from class deadlines. In *Pioneer,* the Court explained that the "excusable neglect" determination should "tak[e] account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. One of the most important circumstances, if not the most important circumstance, is the nature of the omission and the relief sought. As the District of Columbia Circuit has explained, excusable neglect determinations in one context are not easily applied in another context. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) ("we doubt the applicability of such precedents to the present case [involving a late opt-out] because each involves an attorney's failure to file a timely notice of appeal").

As for opt-out and claim deadlines of the sort at issue in this case, they are critical for the management of class actions and are strictly enforced: "leave for an extension of time to opt out . . . is an infrequent occurrence." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 237 (D.N.J. 1997). Courts also properly respect bargained-for settlement structures and class deadlines. Liability beyond what was bargained for in a class settlement is a well-recognized form of prejudice resulting from late opt outs or claims. *See, e.g., In re Diet Drug Litig.*, 92 Fed. App'x. at 893-94 (late opt out would prejudice Defendant by "subject[ing] it to significantly greater potential damages" and causing them to lose at least part of the "benefit of the settlement agreement"); *FG Hemisphere*, 447 F.3d at 840 (recognizing that *Pigford* court was concerned with the effect of late claims on the Defendant's bargained-for settlement).[13]

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[13] Contrary to Petitioners' claim, there is no intra-circuit split within the District of Columbia Circuit. The two cases were decided differently for the very reasons given by that Circuit. The prejudice analysis in each case differed because *Pigford* involved a claims deadline in a class settlement and *FG Hemisphere* involved a default judgment.

By contrast, default judgments are considered "appropriate only in extreme circumstances" and Rule 60(b) is "liberally applied" to set them aside. *TCI Group Life,* 244 F.3d at 696. The beneficiary of a default judgment is not deemed to be prejudiced by having to litigate on the merits. *See id.* Whereas the beneficiary of a default judgment might be considered to receive a "windfall," the same cannot be said for the Defendant in a class settlement seeking to enforce a negotiated claim or opt-out deadline. Unlike the beneficiary of a default, a class action Defendant bargains and pays for a specific outcome or deadline. Moreover, class settlements, unlike default judgments, are the product of litigation on the merits.

In short, the different outcomes in the cases cited by Petitioners do not represent a circuit split. Each of the courts cited by Petitioners applied the same flexible excusable neglect analysis laid out in *Pioneer* and the same standards for identifying prejudice to the non-movant. The different outcomes are the result of widespread *agreement* that motions to vacate default judgments present different considerations than motions for relief from class opt-out or claims deadlines.

B. There Is No Circuit Split Regarding Whether Purported Mail Delays Can Constitute Excusable Neglect.

It is not excusable neglect for counsel to mail a document at the last minute assuming that it will definitely be delivered in just a couple of days. There is no dispute over this principle among the lower courts.[14] A "litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period."

[14] Petitioners cite *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525-26 (2d Cir. 1996), but in that case the court merely provided three extra days, by analogy to Federal Rule of Civil Procedure 6(e), to respond to EEOC right-to-sue letters sent in the mail (consistent with every circuit to consider that issue). Nothing in the decision suggests that parties can meet filing deadlines by mailing documents three days in advance.

Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996). *See also, e.g., Penrod Drilling Co. v. U.S.*, 925 F.2d 406, 408 (Fed. Cir. 1991) (when ordinary mail arrives later than hoped, "[s]uch a foreseeable result cannot be labeled either excusable neglect or good cause"); *In re Crider,* No. 98-2376, 2000 WL 191823, *3 n.3 (6th Cir. Feb. 10, 2000) (unpublished) ("Mail delays, however, are not grounds for excusable neglect."); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249, 1252-53 (7th Cir. 1987) (not excusable neglect to assume document mailed on December 24 would arrive on December 27); *New England Mut. Life*, 204 F.R.D. at 14 (risk that mail sent at the last minute would not be quickly processed rests with mailing party).

The cases cited by Petitioners to establish a supposed "circuit split" involve situations where the moving party mailed the document far enough in advance that it was reasonable to expect timely delivery *and* the delay was caused by unusual circumstances such as misrouting[15] or storms.[16] In some cases, relief was granted only because the mail was sent reasonably in advance of the deadline but ended up taking inexplicably long

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[15] *See In re Cendant Corp. Prides Litigation*, 233 F.3d 188, 197 (3d Cir. 2000) (noting that "misrouted mail" can constitute excusable neglect).

[16] *See U.S. v. Carson*, 52 F.3d 1173, 1180 & n.6 (2d Cir. 1995) (no abuse of discretion in district court's finding of excusable neglect where notice of appeal took four days to travel 100 miles from Mount Ephraim, New Jersey to Manhattan, during a snow storm). Petitioners also cite *Maryland Casualty*, but in that case the Tenth Circuit found no excusable neglect even though the party's lead lawyer had died unexpectedly. *See Maryland Cas. Co. v. Conner*, 382 F.2d 13 (10th Cir. 1967). The passage Petitioners quote are not the Tenth Circuit's words but the words of a commentator. He suggests that delayed mail can constitute excusable neglect where the lawyer mails the document twice as many days ahead of the deadline as is ordinarily required *and* "a storm or other unforeseen cause of delay delayed the delivery.'" *Id.* at 16-17 (*quoting* Robert L. Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 298-299 (1966)). As explained further below, those are not the facts here.

to travel a very short distance.[17] Although such circumstances might provide ground for relief from a missed deadline, there is no authority for the proposition that the normal vagaries of the mail can constitute excusable neglect — much less that a district court as a matter of law must find excusable neglect in this circumstance.[18] There is no circuit split here, just some cases with extraordinary facts.

II. This Case Would Not Be a Good Vehicle to Resolve Any Circuit Split.

A. Relief Is Unavailable Because the Opt-Out Deadline Was a Negotiated Term of the Settlement.

Certiorari is inappropriate here also because, even if Petitioners could establish excusable neglect, relief would still

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[17] *See, e.g., Ramseur v. Beyer*, 921 F.2d 504, 505-07 (3d Cir. 1990) (finding excusable neglect where notice of appeal took 13 days to travel less than five miles from East Orange to Newark, New Jersey); *Zipperer v. School Bd. of Seminole County, Fla.*, 111 F.3d 847, 849-50 (11th Cir. 1997) (no abuse of discretion in district court's finding of excusable neglect for notice of appeal that took more than six days to travel less than 50 miles from Rockledge and Orlando, Florida); *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1563 n.3 (10th Cir. 1991) (finding no "clear abuse of discretion" in district court's finding of excusable neglect where notice of appeal took four days to travel 50 miles from Tulsa to Muskogee, Oklahoma); *Gibbs v. Town of Frisco City, Alabama Police Dept.*, 626 F.2d 1218, 1220 (5th Cir. 1980) (notice of appeal took three days to travel 163 miles from Selma to Mobile, Alabama). All distances are taken from maps.google.com.

[18] Petitioners cite *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir. 1980), in which the Fifth Circuit noted that reliance on "the *normal* course of delivery of mail" can constitute excusable neglect. *Id.* at 522 (emphasis added). In that case, however, the court ultimately found that the appellant had not established excusable neglect for its late filing. *See Sanchez v. Board of Regents of Texas Southern University*, 633 F.2d 1210, 1211 (5th Cir. 1981). With its reference to the "normal course of delivery of mail," the Fifth Circuit was presumably referring to the kinds of extraordinary cases (*e.g.*, storms and misrouted mail) in which courts have found excusable neglect.

not be available to Petitioners. The result below was mandated on the separate and additional ground that the deadline at issue here was a negotiated term of the parties' class settlement agreement. Every lower court to have considered the issue has held that Rule 6(b) does not authorize modification of deadlines agreed to as part of the bargain in a class settlement.[19]

The settlement agreement here set April 11, 2005, as the deadline for the claims administrator to receive opt-out requests. *See* Doc. 1534, Exh. 1 at 13, 19-21. The district court found that "the deadlines [] were the product of vigorous negotiations" given Defendants' goal of settling the MDL litigation on a global basis. Pet. App. at 8a. Petitioners cannot have the contractual term changed for their sole benefit over Defendants' objection.

Courts may refuse to approve a settlement, but courts may not "modify settlement terms or in any manner to rewrite the agreement reached by the parties." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983). *See also Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978) (although "court in reviewing a settlement may make suggestions . . . it may not unilaterally change the decree"). The need to enforce settlement agreements as written "is especially important where, as here, virtually every line and paragraph of the settlement document, and in many instances individual words, are the end products of intense, adversary and prolonged negotiations." *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195 (N.D. Ill. 1981).

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[19] The district court did not rely on this principle in the ruling on appeal, but has since agreed that the settlement agreement's deadline controls. *See* Doc. 1672 at 2-3. On the merits, Defendants may defend the district court's determination on any ground, regardless of whether the ground was relied upon by the courts below. *See U.S. v. New York Tel. Co.*, 434 U.S. 159, 166, (1977) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted").

This general principle has been applied to opt-out and claim deadlines just as to any other term of a settlement. Although Rule 6(b) authorizes district courts to alter *court*-imposed deadlines, the lower courts have consistently held that an opt-out or claim deadline negotiated as part of a settlement agreement may not be modified under Rule 6(b).

In *In re New England Mutual Life*, for example, the court denied a Rule 6(b) motion from a class member whose opt-out request was one day late. The court explained that "the parties bargained for a specific cut-off date in the settlement negotiations. It is an elementary principle of contract law that when parties bargain for a mutually-accepted date, that date has a special legal significance to the agreement." 204 F.R.D. at 13. The court distinguished cases permitting late opt outs where the court, rather than the parties, had set the opt-out deadline.[20] *See id.*

In *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440 (S.D.N.Y. 2004), the court denied a request to submit a late claim also because "the bar date in this case was agreed upon by the parties, not selected by the Court":

> [T]he court is not entitled to expand or contract the agreement of the parties . . . . This principle is strictly followed in class actions where the relief requested would exceed that which the parties had bargained for.

Id. at 445-46. Other cases are in accord. *See, e.g., Kahler v. County of Rensselaer*, No. 03-CV-1324, 2005 WL 1981300, at *2 (N.D.N.Y. Aug. 17, 2005) (denying motion for late class claims because deadline was part of settlement agreement);

[20] Petitioners cited below numerous cases in which courts modified deadlines that were *not* specifically negotiated as part of a settlement agreement. Those cases are inapposite.

In re ML-Lee Acquisition Fund II, No. CIV-A-94722, 1999 WL 184135, at *2 (D. Del. Mar. 23, 1999) ("to accept late-filed proofs of claim and timely filed, but late-corrected proofs of claim would, in essence, be to rewrite the Settlement Agreement . . . a result that substantially modifies the understanding negotiated between Plaintiffs and Defendants"); *Yanda v. Vanguard Meter Serv.*, No. 92 CIV 2827, 1995 WL 358663, at *3 (S.D.N.Y. June 14, 1995) ("The Settlement contains an agreed-to bar date after which claims will not be considered. Because the twenty-six claims at issue here were filed after that date, they may not share in the Settlement Fund.").

In *In re Cendant Corp. Prides Litigation*, the Third Circuit permitted late claims specifically *because* the "District Court determined that any extension . . . would 'not change the bargained-for terms of the Stipulation' because the parties had not negotiated for a date-certain." 233 F.3d 188, 191 (3d Cir. 2000). Rather "the deadline had been left blank" by the parties "and was set by the court." *Id.* at 193. This was the "one crucial way in which this case is distinguishable from *In re ML-Lee*" (discussed above). *Id.* at 193 n.5.

Petitioners' challenges to application of the excusable neglect analysis here would thus not be outcome dispositive in any event. The late opt-out requests could not have been accepted because the deadline at issue was a material, bargained-for term of the settlement agreement.

B. There Has Been No Showing of Excusable Neglect Under Any Proposed Standard.

The district court made specific factual findings that preclude relief regardless of the merits of Petitioner's arguments about the correct legal standard. To the extent Petitioners take issue with the district court's findings — regarding whether Petitioners exercised reasonable diligence, demonstrated their good faith, threatened to prejudice Defendants, or mailed the

opt-out requests early enough reasonably to expect timely delivery — those findings were affirmed by the court of appeals and are entitled to great deference.[21] Moreover, a claim that those findings were erroneous would be a claim merely of misapplication of the law to the facts and not worthy of *certiorari*. *Cf.* Sup. Ct. R. 10.

1. The district court found that Petitioners mailed their opt-out forms at the last minute.

The facts here are a far cry from cases involving misrouted mail, storms, and the like. There is no evidence of any misrouted mail. There is no evidence of any storms.

In the cases on which Petitioners rely, moreover, the document was mailed well in advance of the deadline. As the district court found, that was not the case here. *See* App. at 6a-7a. The district court did not, thus, erect any kind of "*per se*" rule of refusing to consider a purported mail delay as excusable neglect. Rather, the court found that the issue here was not mail delayed by the post office, but mail sent by Petitioners too late to guarantee timely delivery.

Petitioners sent their opt-out requests by ordinary mail from Washington, D.C. at 11:06 p.m. on Thursday April 7, 2005, effectively Friday morning. This left just *one business day* for delivery 1000 miles away in West Palm Beach, Florida, by the

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[21] A late opt-out request "involves a case-management decision in a complex class action, in which *district court discretion is at its greatest*." *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1210 (D.C. Cir. 2003) (emphasis added). "Given the highly deferential standard under which we review the district court's decisions concerning opt-out requests . . . , we must afford the court's determination fairly broad latitude." *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 268 F.3d 627, 634 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002) (citation omitted).

Monday, April 11 deadline.[22] It should surprise no one that the opt out forms were received after the deadline. That is not postal delay, but the unremarkable fact that mail can take longer than Petitioners allotted to reach a destination 1,000 miles away.

Thus, even if it were it reasonable to assume that mail will assuredly arrive in some period of time, here there was not "enough lead time in the normal course for the opt-outs to be received by the deadline." Petition at 23. The district court in its discretion found unconvincing Petitioners' assertion that it was reasonable to *assume* that their opt outs would be delivered from Washington to West Palm Beach so quickly.[23] And the facts here disprove Petitioners' claims: 14 of the 15 opt out requests sent by their counsel at 11:06 p.m. from Washington, D.C. failed to arrive on time.

The supposed circuit split advanced by Petitioners regarding the treatment of mail delays is irrelevant here.

2. Petitioners have failed to explain their delay.

The district court found that the untimeliness here was caused by Petitioners' decision to wait until the last minute to

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[22] The district court stated that Petitioners sent the opt outs *two* business days in advance because Petitioners refused to disclose when on April 7 they mailed the forms. *See* App. at 6a-7a. Even when the district court asked them flat out, Petitioners refused to disclose the time of mailing. *See* Doc. 1631, Transcript (June 28, 2005) at 13: 22-24 ("I found Miss Wallace's affidavit very interesting. They were all mailed about the same time, but she doesn't disclose when. Were they mailed at midnight?"). Petitioners have now been forced to admit that the district court guessed right: the forms were mailed at close to midnight.

[23] *See, e.g.*, Doc. 1631, Transcript (June 28, 2005) at 13:14-17 (asking why Petitioners "wait[ed] until April 7th to mail them, given the speed with which mail occurs in the United States today").

send their opt-out forms. *See* App. at 6a-7a. The district court asked Petitioners to explain "the reason for the delay" so that it might make an excusable neglect finding. *Pioneer*, 507 U.S. at 395. But Petitioners failed to provide any credible explanation for the decision to wait until 11:06 p.m. on April 7. Although Petitioners initially claimed that the delay was due to the need to compile purchase data requested by the opt-out forms, they introduced no supporting evidence. Indeed, the affidavits provided by Petitioners' expert and counsel pointedly did not state that the purchase data could not have been compiled earlier. *See, e.g.*, Doc. 1647, Vieux Decl., Exh. D. Rather, Petitioners' counsel has explained that they began gathering the relevant information more than a year before the settlement. Doc. 1602, Vieux Decl., Exh. 4 ¶¶ 1-4.

By itself, the failure to explain the delay required the district court to deny relief. "[W]ithout a predicate explanation of the events that occasioned the . . . delinquency (*i.e.*, the reason for the failure to deliver a timely 'opt out' notice), the analysis of excusable neglect is effectively impossible." *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 643 (M.D. Fla. 2002).

3. Petitioners' failed to exercise reasonable diligence before and after the mailing.

The district court found also that Petitioners failed to exercise reasonable diligence both before and after the last-minute mailing. Without a showing of reasonable diligence, there was no basis for relief. *Cf. Ramseur,* 921 F.2d at 506 (noting that "counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5)"); *Tarabishi,* 951 F.2d at 1563 n.3 (noting that "[u]pon learning that it had been filed late, Defendants/cross-appellants filed a motion for extension of time").

This Court has also expressed the view that litigants are expected to take appropriate precautions when submitting documents by mail. In creating a special mailbox-rule for notices of appeal filed by *pro se* prisoners, the Court explained that there was no reason to adopt a mailbox rule for ordinary litigants because:

> they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it.

Houston v. Lack, 487 U.S. 266, 271 (1988).

These are exactly the sort of precautions that, as the district court found, Petitioners failed to take. Not only did Petitioners wait until the last minute to mail their opt-out forms but Petitioners also failed to use Priority Mail. *See* App. at 6a n.2. Petitioners also failed to take the simple precaution of contacting the claims administrator on April 11 to check if their opt-out requests had been received (at which time Petitioners could have faxed or emailed the requests as back-up). *See id.* 7a n.3. Petitioners failed also to promptly seek relief from the deadline even though they received return receipts in mid-April informing them that their opt-out requests were late. Petitioners' claim to have "simply placed [the return receipts] in the file" without looking at them; but that only reinforces the conclusion that Petitioners were not diligent. Doc. 1647 at 3.

There is no basis under any standard in any case to find excusable neglect given this utter lack of diligence.

4. There is no evidence of good faith by Petitioners.

A party seeking relief under the excusable neglect standard must also demonstrate its good faith. The district court found that Petitioners had failed to provide any "affidavit or other evidence" establishing good faith. Pet. App. at 8a & n.6.

Indeed, the district court found that it "could reasonably conclude that the [Petitioners] waited until the last minute *intentionally* with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions." *Id.* at 8a (emphasis added). As explained above, Petitioners were concerned about Defendants' pending appeal in the Eleventh Circuit from the indirect purchaser class certification. *See supra* at 10. By sending their opt-out requests at the last minute, Petitioners might have minimized the chances of Defendants' terminating the settlement and proceeding with the appeal based on their opt outs. The district court found it reasonable to conclude that, far from being in good faith, the late opt outs were an effort to gain a tactical advantage.

Petitioners claim that good faith was demonstrated by their efforts to compile purchase data requested by the opt-out forms. But Petitioners' story regarding the data has flip-flopped to such a degree as to be wholly unreliable, and the district court was certainly within its discretion to reject it. In their initial Rule 6(b) motion and affidavit, Petitioners did not even mention the time allegedly needed to compile data. *See generally* Doc. 1580 & Exh. A, Aff. of Wallace. Then Petitioners insisted to the district court that this data was "required" by the opt-out requests. *See* Doc. 1631, Transcript (June 28, 2005) at 14-16, 24-27. When, as happened in *Lorazepam*, the district court criticized that mischaracterization of the opt-out form, Petitioners backpedaled and claimed that although the data was not required, it did cause

the delayed mailing. *See* Doc. 1602 at 2, 6-7. But that claim was shown to have no factual basis inasmuch as Petitioners have never introduced any admissible evidence that the data could not have been compiled sooner. Now, before this Court, Petitioners artfully and carefully discuss the data issue without asserting that the need to compile data caused any delay. *See* Petition at 13 n.17.

In the absence of a demonstration of good faith, Petitioners' would not have been entitled to relief under the excusable neglect standard regardless of the analysis of mail delays and prejudice. The resolution of the supposed circuit splits would not affect the outcome of this case.

III. Petitioners' Position Would Transform Filing Deadlines Into Postmark Deadlines.

Petitioners' proposed rule would undermine all filing deadlines under the Federal Rules. Contrary to Petitioners' claim, relief is not "mandated" under Rule 6(b) whenever mail is not received in three days (much less in one or two days). Pet. at 24 n.27. To adopt Petitioners' position would transform all filing deadlines into postmark deadlines (unless perhaps an opposing party could demonstrate spoliated evidence or witnesses made unavailable in the interim). Notices of appeal, for example, would merely need to be postmarked 27 or 28 or even 29 days from entry of judgment, not filed within 30 days. *Cf.* Fed. R. App. P. 4(a)(1). Motion papers would merely need to be mailed to the court a couple of days before the filing deadline, rather than timely filed with the clerk. The excusable neglect standard was not intended to eliminate the legal effect of filing deadlines.

Petitioners would have this Court create the very kind of *per se* rule rejected in *Pioneer*. *See* 507 U.S. at 389-395. The "flexible" and "elastic" analysis espoused by *Pioneer* must leave room for a district court familiar with the parties, the situation,

and the record to exercise its discretion to deny relief where it concludes that reasonable diligence and good faith were not demonstrated.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

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No. 06-475

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Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at pages iii-v of the petition for a writ of certiorari, and there are no amendments to those Statements.

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This case illustrates some of the worst abuses of the class-action settlement process. After secretly excluding petitioners' state-court claims from the amount of the settlement, respondents drafted the opt-out requirements in a way to trap unwary absent class members, by specifying the form of transmittal ("first-class mail"), requesting cumbersome information, and requiring that opt-out notices be mailed "in time to be received" by April 11, 2005. Pet. App. 48a. Of the 15 comprehensively researched and scrupulously compiled information packets for the Blue Cross companies' opt-outs mailed in this manner four days before the deadline, one arrived on time, seven arrived between midnight and 6:00 a.m. on April 12, and the seven at issue here arrived days later. Eager to hold on to their windfall, respondents have vigorously contested the timeliness of the opt-outs, even though they suffered no prejudice at all. They expected those opt-outs and took them into account in striking a settlement with the class counsel. In holding that petitioners failed to meet the excusable neglect standard for their opt-outs, the courts below abdicated their responsibility to protect the rights of absent class members to opt out of an egregiously insufficient settlement. The courts functionally ignored the prejudice requirement and denied litigants a right to assume the normal delivery practices of the U.S. Postal Service. Both holdings deepen circuit conflicts that now encompass the vast majority of the circuits.

Respondents engage in a series of mischaracterizations to retain their unjust victory. They seek to distinguish away a well-recognized circuit conflict by erroneously contending that prejudice means something different in the class-action context than it does in the default judgment context and by simply ignoring that courts are on both sides even in those contexts. On the second issue, they mischaracterize the cases on petitioners' side of the 5-4 split as containing only "extraordinary facts" (Opp. 17), but those circuits routinely give weight to reliance on the mails in ordinary circumstances.

I. A DEEP CIRCUIT CONFLICT PERSISTS ON THE PREJUDICE REQUIREMENT UNDER THE EXCUSABLE NEGLECT STANDARD

A. Class-Action Defendants Are Not Exempt From *Pioneer*'s Prejudice Analysis

In the context of excusable neglect, prejudice exists where excusing a missed deadline would deprive the nonmovant of a right or option it would have enjoyed had the deadline been met. A litigant must be in a worse position in litigating its claims or defenses, and not merely lose a windfall dismissal. *See* Pet. 16-17.

Respondents identify no right or option they would lose if the late arrival of petitioners' opt-outs were excused. Respondents' ability to defend the Illinois state claims brought by petitioners nearly two years before seeking to opt out here would in no way be compromised. *See* Pet. 7, 16-17. Nor do respondents dispute that enforcing the deadline would give them a double windfall, because they and class counsel discounted the settlement amount by the value of petitioners' claims on the solid expectation that petitioners would opt out and continue pursuing their Illinois claims. *See* Pet. 8-9, 17. Likewise, respondents do not disagree that requiring petitioners to share in the settlement fund would unfairly diminish the claims of other class members to that fund. *See* Pet. 9-10, 17.

Respondents concede the merit of petitioners' interpretation of prejudice: "The beneficiary of a default judgment is *not* deemed to be prejudiced by having to litigate on the merits." Opp. 15 (emphasis added). Respondents wrongly claim that opt-out deadlines are different because, "[u]nlike the beneficiary of a default, a class action Defendant bargains and pays for a specific outcome or deadline." *Id.* But *courts* approve settlement agreements under Rule 23, and, although Rule 6(b) expressly excludes seven federal rules from the excusable neglect standard, Rule 23 is not among them. In that context, "additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotations omitted).

Accordingly, other courts reject the contention that class-action settlement agreements are governed "*only* by black-letter contract law" and hold that a district court retains "special responsibility to see to the administration of justice" and may "assert this power to allow late-filed proofs of claim." *In re Cendant Corp. PRIDES Litig.*, 233 F.3d 188, 194-95 (3d Cir. 2000) (internal quotations omitted).

Those principles apply here. Absent class members like petitioners had no opportunity to engage in any "bargain[ing]" with defendants. And respondents identify no benefit of their "bargain" that they lost from petitioners' opt-outs arriving a few days after April 11. Nor could they: the settlement agreement gave respondents until May 9 to exercise their "blow" rights, and petitioners' opt-outs were excluded from the Rider A "blow" threshold precisely because respondents, class counsel, and the district court all knew that petitioners intended to opt out and they wanted to craft a settlement that would not be upset by those opt-outs. *See* Pet. 8-10. Excusing strict compliance with the deadline here would not deprive respondents of any benefit of their bargain, but rather would give them what they bargained for: a settlement payment that excluded the value of petitioners' claims and left petitioners free to continue litigating their state claims.[1]

B. Courts Are Deeply Divided On Whether The Loss Of A Windfall Constitutes Prejudice

Respondents acknowledge that a deep circuit split exists on whether the loss of a windfall dismissal from an excused deadline constitutes prejudice. They call it "illusory" (Opp. 2), however, because (1) courts of appeals in

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[1] Respondents assert without elaboration that "the April 11 deadline for TPP opt outs was linked to Defendants' deadline to terminate the *direct* purchaser class settlement." Opp. 6 n.6. Although the direct purchaser agreement permitted respondents to terminate it if the blow threshold from the "Indirect Purchaser Litigation is triggered," CA App. 13, No. 06-14055-CC (11th Cir. filed June 27, 2005) ("CA App.") (Direct Purchaser Settlement Agreement at 12), Rider A made petitioners' opt-outs completely irrelevant to that issue, *see* Pet. 8-9.

class actions have *sometimes* recognized litigation exposure on late opt-out claims as a form of prejudice, and (2) courts of appeals in *non-class actions* have *sometimes* refused to find such prejudice. *See* Opp. 12-15.

1. Respondents' distinction is unsound. Whether the deadline is in a federal rule, an approved class-action settlement agreement, or a court ruling, no prejudice arises if the defendant loses no rights or options it would have enjoyed but for the missed deadline. The context of a default judgment or class action does not alter the analysis.

A default judgment precludes any further litigation on the matter. But a court's refusal to grant relief from a tardy opt-out is no less final. It sweeps an unwilling class member into a binding settlement agreement and, as a supposed consolation, provides a pay-out that is often only a small fraction of the harm incurred. The carve-out for class-action defendants urged by respondents is thus highly inequitable. Respondents seek to enforce their supposed "bargain" against petitioners, which, as absent class members, had no part in its making. That lack of privity calls for *more* protection under the excusable neglect standard, not less: "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

2. Even viewing this solid 5-3 split on respondents' fundamentally flawed terms, it would still merit review.

a. In class actions as well, courts of appeals have declined to find substantial prejudice from loss of a windfall dismissal. As respondents acknowledge (at 13 n.11), the Tenth Circuit has found "no prejudice suffered from the enlargement of time" where a class member sought relief from a tardy opt-out so that it "could pursue potential individual claims in private litigation." *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289, 1291 (1974). The court thus excused strict compliance with the opt-out date negotiated in the settlement agreement by looking to the

effect of excusing the untimely opt-out and finding it not to prejudice the defendants.[2]

Respondents also rely (at 14) on the D.C. Circuit's decision in *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (2003), but that case affirmed the district court's finding of excusable neglect based on its judgment that a class-action defendant "would not be substantially prejudiced by [an] untimely opt-out" filed two-and-a-half months late. *Id.* at 1209-10. If respondents' class-action benefit-of-the-bargain theory were correct, then the court would have had to find substantial prejudice.[3]

b. Similarly, courts asked to vacate default judgments based on excusable neglect have recognized *and* refused to find exposure to litigation as a form of prejudice in assessing excusable neglect. *Compare, e.g., Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) (loss of default judgment is not "the sense in which the term 'prejudice' is used in *Pioneer*"), *with Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983) (having to litigate claims after vacatur of default judgment is prejudicial).

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[2] Respondents seek to distinguish *Four Seasons* on the ground that the appellant, Arthur Andersen, was not a party to the settlement agreement but had resisted the excusable neglect motion because it might be liable for any judgment entered against the (apparently bankrupt) defendants on a "third party liability or indemnity" theory. 493 F.2d at 1289 n.1; *see* Opp. 13 n.11. That distinction is irrelevant because the court was in fact construing the settlement agreement by which the defendants themselves were bound, and any bargain in that agreement was theirs and not Arthur Andersen's. Such third-party liability is functionally no different from an insurance company's potential liability for a judgment entered against its insured.

[3] *Vitamins* conflicts with the opt-out-context holdings of the Eleventh Circuit below and the Third Circuit in *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 92 F. App'x 890 (2004), and deepens the intracircuit conflict in the D.C. Circuit between *Pigford v. Johanns*, 416 F.3d 12 (2005) (finding prejudice where excusing late class-action opt-out would remove a windfall dismissal), *cert. denied*, 126 S. Ct. 1581 (2006), and *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (2006) (finding no prejudice from vacating default judgment). *See* Pet. 21-22.

In short, the cases simply do not support respondents' fanciful classifications. Nor is respondents' notion that parties to a class-action settlement can merely contract around Rule 23 (Opp. 18-19) consistent with this Court's repeated admonition that district courts exercise an important case-management role in supervising class-action settlements to guarantee due process protections.[4]

II. THE CIRCUITS ARE DEEPLY SPLIT ON WHETHER RELIANCE ON THE NORMAL COURSE OF MAIL DELIVERY SHOULD BE AFFORDED ANY WEIGHT UNDER *PIONEER*

A. Respondents Do Not Undermine The 5-4 Split

A 5-4 conflict exists on whether reliance on the normal course of mail delivery gets weight in the excusable neglect calculus. *See* Pet. 25-27. Respondents claim that the cases cited by petitioners where courts of appeals have found excusable neglect all involve "extraordinary facts," including long delivery delays and other "unusual circumstances" such as "storms." Opp. 15-17. The issue is not

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[4] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 853 (1999) (district court's "independent valuation" of a settlement fund prior to class certification is required to protect absent class members' due process interests); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("vital importance" of "undiluted, even heightened, attention" to class settlements). Respondents also claim that this case is not a "good vehicle" because the Eleventh Circuit's order may be affirmed on the alternative ground that the district court was powerless to grant relief from the settlement agreement deadline. *See* Opp. 17-20. Neither of the courts below rested its decision on that ground, *see* Opp. 18 n.19, and none of the cited court of appeals decisions stands for that illogical proposition. In *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983), the court simply explained that a defendant that had agreed to pay a sum certain with no opt-outs could not be compelled to pay that same sum and yet permit opt-outs. In *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978), the court likewise held that a district court may not unilaterally change the settlement amount agreed to by the defendant. Here, respondents discounted the settlement amount expecting that petitioners would opt out, and petitioners seek merely to enforce that agreement. *See also supra* p. 3 (discussing *Cendant*).

what facts would merit a finding of excusable neglect. Rather, it is whether the ordinary course of mailing merits some weight under this Court's *Pioneer* analysis. As respondents concede (at 15-16), five circuits, including the Eleventh Circuit below, reject that proposition and give *no* weight to reliance on the normal course of mail delivery. *Compare* Opp. 15-16 *with* Pet. 26-27.

Another four courts of appeals have squarely held that reliance on the normal course of mail delivery should be given *some* weight. *See* Pet. 25-26. Respondents arrive at their blanket characterization of those cases only by exaggerating the circumstances in which courts of appeals have found excusable neglect as a result of mail delays. In *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1563 n.3 (1991), for example, the Tenth Circuit found excusable neglect where a tardy notice of appeal sent three days in advance of its deadline arrived one day late, where mail between the two cities typically arrived in two days. Similarly, in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (1980), the Fifth Circuit reversed the district court and found excusable neglect not because of "extraordinary facts," "unusual circumstances," or "storms" (Opp. 16-17), but because the three-day delivery time for the tardy-filed notice of appeal exceeded "the published service standards of the United States Post Office" for mail delivery between the two cities in question. 626 F.2d at 1220-21; *see also Sanchez v. Board of Regents*, 625 F.2d 521, 522 (5th Cir. 1980) ("reliance on the normal course of delivery of mail is reasonable"). Far from unusual circumstances, these cases involve, as in petitioners' case, mundane delivery delays in inter-city mailings.[5]

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[5] In the one case involving a storm, the court held that, at a minimum, excusable neglect may be predicated on "uncontrollable delays in mail delivery." *United States v. Carson*, 52 F.3d 1173, 1180 (2d Cir. 1995) (internal quotations and emphasis omitted); *see also Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 52, 525 (2d Cir. 1996) (relying on three-day mail delivery assumption in Rule 6(e)); *Ramseur v. Beyer*, 921 F.2d 504, 507 (3d Cir. 1990) (tardy notice of appeal filings excused "when

The opt-out form *required* petitioners to use "first-class mail" rather than a faster and more reliable method. *See* Pet. 10 & n.15, 24. Petitioners mailed their notices four days in advance of the deadline under circumstances where the U.S. Postal Service says that first-class mail typically arrives in 2-3 days. *See* Pet. 23-24.[6] Thus, according to the Postal Service itself, petitioners allowed *more* time than necessary. What the post office did in the delivery process was not under their control. Indeed, all 15 of the Illinois TPP opt-outs were mailed at the exact same time from the exact same post office. Yet one arrived by April 11, seven others arrived on April 12 just four hours after the midnight deadline, and petitioners' seven notices arrived on April 13 and 15. *See* Pet. 11-12. Petitioners would be eligible for relief under these circumstances in at least four circuits, but foreclosed in five others. This deep circuit conflict on an issue of recurring importance to litigants warrants this Court's review.

B. Petitioners Exhibited Good Faith

To opt out, petitioners were required to compile thousands of employer identification numbers – data not readily available in existing databases. In addition, despite the fact that the requested individual drug purchase data were not expressly required, petitioners in good faith undertook the mammoth task of compiling those data because the opt-out notice claimed that respondents needed them before May 9 to evaluate their rights under the then-sealed Rider A blow provision. *See* Pet. 11. To be sure, petitioners could have filed their notices without those data and made respondents compel their production "via subpoena," Pet. App. 46a, but that would have made

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they are mailed at such a time and in such a manner that, under normal circumstances, the district court would have received them in a timely fashion").

[6] Respondents repeatedly suggest that petitioners should have sent their notices by Priority Mail. *See* Opp. 1, 7, 11, 24. But they nowhere dispute that the Postal Service reports precisely the same delivery time for priority as for regular first-class mail. *See* Pet. 23-24.

it highly unlikely for respondents to receive the data before May 9. Petitioners instead chose *voluntarily* to comply with the request and thereby to incur tens of thousands of dollars in costs, including 950 attorney and staff hours, plus substantial costs billed by an outside data processing firm. *See* CA App. 217-20 (Hardy Vieux Decl.).

Respondents claim that, to exhibit good faith, petitioners should have *ignored* the request for data that respondents said they needed and mailed the forms earlier. *See* Opp. 20-26. The irony of respondents' approach is readily apparent, for petitioners' good-faith compliance with respondents' request was expensive and time-consuming. Moreover, as respondents then knew but petitioners did not, Rider A deemed petitioners' opt-outs – and therefore the requested drug purchase data – completely irrelevant to calculating any termination rights that might have arisen for respondents on May 9. Respondents' request for drug payment data was thus a highly disingenuous form of "gotcha," causing petitioners to waste significant resources and ultimately to lose their opportunity to opt out. In granting certiorari and reversing the decision below, this Court should renounce the types of burdensome and unnecessary opt-out conditions that can make it difficult and expensive for class members seeking to exercise their due process rights to opt out of an insufficient class-action settlement and pursue their individual claims.[7]

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[7] Respondents disingenuously assert that petitioners misrepresent that the drug purchase data were "required" rather than "requested." Opp. 1, 8-10, 25. Petitioners' excusable neglect motion acknowledged at page one that the data were "requested" (Dist. Ct. Docket 1580). Petitioners' supposed misrepresentation was a single misstatement in oral argument that counsel quickly corrected. Respondents nonetheless repeatedly mischaracterize petitioners' position, even though it has no bearing on the issues before this Court and it in no way undermines petitioners' good faith in providing the voluminous requested data. Respondents next complain (at 10) that Kaiser and CareFirst did not supply the requested drug purchase data, but Kaiser did so in discovery and CareFirst does not operate in the 18 states covered by the class, so it had claims only where its members filled prescriptions

Respondents' misguided attack on petitioners' integrity next asserts that petitioners' claim to have allowed four days for mailing is "highly misleading." Opp. 7. Respondents characterize the time period as, alternatively, "*one business day*," "a couple of days," and "one or two days." Opp. 15, 21, 26; *cf.* Opp. 15 n.14 ("three days"). But the time between Thursday night, April 7, and Monday night, April 11, was plainly four days. In thus mischaracterizing a basic and indisputable fact, respondents tacitly acknowledge the inequity in their position (and that of the court below) that petitioners fully "assumed the risk" that their notices would not arrive on time, even though petitioners allowed an extra day in addition to the normal 2- to 3-day course of first-class-mail delivery and were not permitted by the opt-out form to send it in any manner other than first-class mail. Such reliance is given strong weight in four circuits, but none in five others.

Finally, respondents wrongly claim that petitioners' position "would transform all filing deadlines into postmark deadlines." Opp. 26. Rather, it would require the court to give weight to reliance on the normal course of mail delivery in balancing the *Pioneer* factors. Where, as here, the opt-out notice negotiated by respondents with plaintiffs' class counsel *required* petitioners to use first-class mail rather than a faster or more reliable service, petitioners should be permitted to rely on the Postal Service's normal practice in assessing their excusable neglect.

CONCLUSION

The petition for a writ of certiorari should be granted.

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while traveling – a complication that prevented completing the calculations in time. Respondents also complain (*id.*) that Federated Mutual did not provide EINs for self-funded plans, but that entity had no self-funded plans to report.

Respectfully submitted,

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December 20, 2006

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No. 06-475

IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERATED MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,

Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF LAW PROFESSORS MYRIAM GILLES AND GUY CHARLES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF PROFESSORS MYRIAM GILLES AND GUY CHARLES FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Professors Myriam Gilles and Guy Charles move, pursuant to Supreme Court Rule 37, for leave to file the annexed Brief as *amici curiae* in support of the petition for a writ of certiorari. The Petitioners have consented. Hardy Vieux, of Robins, Kaplan, Miller & Ciresi L.L.P., counsel for Petitioners, contacted Respondents on behalf of *amici*, and sought but did not receive consent. Professors Gilles and Charles are therefore filing this motion.

The issue presented by the petition—whether a per se rule of excusable neglect should be applied to foreclose Petitioners' ability to opt out of the proposed class settlement—has broad implications beyond the important constitutional due process and litigant autonomy points raised by Petitioners writ. In particular, the right to opt out of class actions and class settlements serves the critical objective of deterrence. Because the *amici* believe their views would materially assist the Court in its consideration of the petition for a writ of certiorari, they respectfully request leave to file the attached brief.

Dated: December 4, 2006

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QUESTION PRESENTED

Whether the ability of class members painlessly to opt out of a class action or a proposed settlement implicates deterrence-based concerns such that courts should analyze procedural burdens associated with opting out – such as the excusable neglect standard involved in this case – to maximize the exit capabilities of those who wish to commence independent litigation.

INTERESTS OF *AMICI CURIAE*[1]

Myriam Gilles is a professor of law at the Benjamin N. Cardozo School of Law. She has written numerous articles in the areas of civil rights and class actions, and has recently co-written an article asserting that small-claims class actions are best justified as a deterrent measure, rather than as a mechanism for compensating victims of widespread but low-value wrongdoing.[2] From this deterrence-based perspective, courts assessing the efficacy or desirability of class action practices should focus solely on forcing wrongdoers to internalize the social costs of undesirable behavior.

Guy-Uriel Charles is the Russell M. and Elizabeth M. Bennett Professor of Law at the University of Minnesota. He teaches and writes in constitutional law, civil procedure, and election law.

SUMMARY OF ARGUMENT

This case concerns an effort by various insurance companies to opt out of a class action settlement struck by class counsel with defendant pharmaceutical companies for violations of

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[1] This brief of *amici curiae* was written by Professors Myriam Gilles and Guy Charles. In accordance with Rule 37.6, the Professors state that this brief was not authored in whole or in part by counsel for any party. The printing, binding and filing of this brief was paid for by healthcare providers not party to this appeal: BlueCross BlueShield of Massachusetts, Blue Cross and Blue Shield of Nebraska, Excellus Health Plan, Inc., The Guardian Life Insurance Company of America, and Horizon Blue Cross Blue Shield of New Jersey.

[2] Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103 (2006).

the antitrust laws. The petitioners mailed their opt-out notices before the deadline, but the U.S. mail did not deliver the notices until after the opt-out period had ended. Therefore, the narrow issue before this Court is whether a per se rule on excusable neglect should be applied to foreclose such opt-outs.

But the resolution of this narrow, somewhat technical issue has broad policy consequences quite separate from the doctrinal and constitutional effects described in the main petition. In addition to serving the interests of due process and litigant autonomy, the right to opt out of class actions and class settlements serves the critical objective of deterrence. Contemporary class action practice is best justified on a deterrence-centric model of maximizing the social costs the wrongdoer is forced to internalize. In light of this primary objective, procedural hurdles placed in the way of opt-outs are counterproductive, as opt-outs seeking to commence litigation independent from the class can serve as an additional, and potentially powerful, deterrent force within the class action system.

ARGUMENT

A. TRADITIONAL JUSTIFICATIONS UNDERLYING THE OPT-OUT RIGHT

Opt-out rights play a central role in class action litigation – both in the theoretical underpinnings that legitimize class actions and in the practical, day-to-day operation of class action litigation. As petitioners argue in their main brief, the

right to opt out has significant constitutional dimensions.[3] Federal Rule of Civil Procedure 23(c)(2)(A) requires that class members be given the opportunity to exclude themselves from a (b)(3) case. This right "provides a key premise for many of the basic principles that shape the (b)(3) action – jurisdiction over absent parties, due process considerations, judicial review of settlements, awards of attorneys fees, and much more."[4] The right to opt out of the class is therefore central to "the argument for why (b)(3) class actions satisfy procedural due process requirements, even though absent class members are represented by attorneys they did not select and may have never met."[5] As this Court suggested in *Phillips Petroleum Co. v. Shutts*,[6] a class member only submits to the jurisdiction of the court after receiving notice of the action and failing to opt out.

In addition, opt-out rights are central to due process concerns associated with the binding nature of class action settlements. In the words of Professor Isaacharoff, "a due process right to opt out is a prerequisite for a binding judgment."[7] Once that prerequisite has been fulfilled, "the courts will bind class members to the judgment if they fail to exercise their privilege to exclude themselves from the class..." and courts will enjoin or refuse to permit class members who failed to

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3 Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529 (2004).

4 *Id.*

5 Eisenberg & Miller, *supra* note 3, at 1534.

6 472 U.S. 797 (1985).

7 Samuel Isaacharoff, *Preclusion, Due Process and the Right to Opt Out*, 77 Notre Dame L. Rev. 1057 (2002).

opt out to re-litigate matters decided in the class action by way of judgment or settlement.[8]

Finally, opt-outs serve important non-constitutional goals. For example, opt-outs may function as a signal to the judge on the fairness of the overall class settlement[9] the opportunity to opt out allows high-value claimants (particularly in the mass tort context) the chance to maximize individual recovery[10]; and, more generally, the right to opt out provides litigants their "day in court,"[11] thereby fostering the sense of

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8 Eisenberg & Miller, *supra* note 3, at 1535.

9 John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Action*, 95 Colum. L. Rev. 1343, 1382 (1995) (noting that the "existence of substantial opt-outs may be the best evidence that the original settlement was inadequate (and possibly collusive)").

10 In the mass tort context, individual claimants may have high-value damages that they wish to pursue in independent tort actions. *See, e.g.*, Coffee, Jr., *supra* note 9, at 1447 (stressing the importance of allowing opt-outs in the mass tort context).

11 *See, e.g.*, Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1174 (1998) ("[r]ecognition of a substantive due process right to opt out of at least some damages claims has considerable plausibility. It would limit the threat posed by modern aggregation practice to our long-standing tradition of individual litigation and autonomy."); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L. Rev. 461, 472 (1997) (arguing that the opt-out right is central to "the right to assert one's own rights"); Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, 2003 U. Chi. Legal F. 475, 510 (2003) (asserting that "all options have some positive view, and the control of one's own litigation cannot be

fairness and autonomy that is critical to the legitimacy of the civil justice system.

For all these well-rehearsed reasons, much discussed by scholars in this area,[12] opt-outs should be accorded every reasonable accommodation and benefit of the doubt. Any procedural or practical burdens placed in the way of opt-outs should be reduced or eliminated, so as to make opting out of a class action or settlement as easy as possible.

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regarded as a small detail within the overall scheme of civil procedure").

12 *See, e.g.*, John E. Kennedy, *Class Actions: The Right to Opt-Out*, 25 Ariz. L. Rev. 3 (1983); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum v. Shutts, 96 Yale L.J. 1 (1986); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions,* 1999 Sup. Ct. Rev. 337; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (2000). Indeed, even the handful of scholars who critique opt-outs do so for utilitarian reasons, and as such, recognize their importance to the system of class litigation. *See, e.g.*, Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 136 (1997) (arguing that opt-outs can disrupt settlements that are desirable to the majority of class members); David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831 (2002) (advocating mass-tort class actions with no opt-out rights). As others have therefore noted, "those commentators who criticize opt-out rights…generally agree about the importance of the procedure – otherwise they would not be so critical." Eisenberg & Miller, *supra* note 3, at 1540.

1. Deterrence-Based Rationale for Maximizing Opt-Out Rights

In addition to these traditional justifications for the opt-out provisions of Rule 23, this Court should also consider the importance of deterrence. Congress, by including within the Clayton Act a private right of action, sought to maximize the detection and prosecution of antitrust violations, and thereby to maximize the deterrent potential of private antitrust litigation, including but not limited to class action litigation.[13] Any impediments to the right to opt out – such as the mailing requirement at issue here, or the failure to apply a rule of excusable neglect – hamper these fundamental goals.

2. Collusive Settlements

In many cases, both class counsel and defendants' attorneys have obvious incentives to erect artificial impediments to opting out.[14] After all, opt-outs serve as a check on class

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[13] *See, e.g.*, Corinne Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 J. Int'l Bus. & Law 203 (2006) ("With 90% of its antitrust law enforcement generated by private rights of action, the United States provides a great opportunity for aggrieved consumers to right the wrongs that have been done to them, while concurrently, maximizing its avenues of antitrust enforcement. Consumers assist the Department of Justice (DOJ) and the Federal Trade Commission (FTC) with the enforcement of the U.S. antitrust law by asserting the right granted to them under the Clayton Act to bring private actions.").

[14] *See, e.g.*, John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 Cornell L. Rev. 851 (1995) (criticizing contemporary class action practices where, among other things, the value of the class action is reduced by the burdening of opt-out choices presented to class members).

counsel,[15] reduce the size of the class and thereby weaken class counsel's leverage in settlement, and decrease class counsel's potential compensation.[16] Defendants also benefit from low opt-out rates, as they can achieve a more comprehensive and likely cheaper settlement with one set of lawyers than with many.[17] As Professors Cohen and Koniak remind us, class counsel and defendants will engage in much creative lawyering to reduce the total number of opt-outs:

> One strategy is to make the class as big and undivided as possible, which means bigger fees for class counsel, greater finality for defendants, and fewer competing plaintiffs'

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15 Coffee, *Class Wars*, at 1450 ("The modern value of the right to opt out may lie more in its utility as a checking mechanism than its ability to protect litigant autonomy.").

16 Concerns about class counsels' incentive to minimize the number of opt-outs was likely one of the factors considered by the Advisory Committee in drafting new Rule 23(e)(2), which requires parties seeking approval of a class action settlement to "file a statement identifying any agreement made in connection with the proposed settlement," including agreements setting out the number of opt-outs needed to trigger a "blow provision" or defendant's right to walk away from the deal. Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments. *See also* Anthony Rollo & Gabriel A. Crowson, *Mapping The New Class Action Frontier – A Primer on The Class Action Fairness Act and Amended Rule 23*, 59 Consumer Fin. L.Q. Rep. 11 (2005) (noting that the amended rule "may help limit some possible existing potential abuses or improper collusion").

17 *See, e.g.*, Brian Wolfman & Alan B. Morrison, *What the* Shutts *Opt-Out Right Is and What it Ought to Be*, 74 UMKC L. Rev. 729, 731 (2006) (noting that "in many of these cases, the defendant would prefer that the class action be 'mandatory,' or non-opt-out, to maximize the settlement's res judicata effect").

> lawyers to muck things up . . . . Another strategy is to find methods to lock class members into settlements, thereby defeating the ordinary right of absent class members to 'opt out.' Transforming opt-out classes into non-opt-out classes is another way of ensuring as much finality as possible for defendants.[18]

The lawyers' allied incentives are clear, as is the extent to which such actions undercut the deterrent power of the antitrust laws and other federal statutes.[19] For this reason, the appropriate test for determining the validity of the opt-out should be far more exacting than the deferential standards under which the circuit court affirmed the district court's approval of the settlement, containing within it the mailing rule at issue here. Courts should be particularly vigilant against any measure that impedes the ability of class members to opt out.

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[18] George Cohen & Susan Koniak, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 147 (2001).

[19] This is especially true given than most antitrust class action settle. *See, e.g.*, Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, Antitrust, Fall 2005, at 26 (discussing a study of individual and class action antitrust cases finding that 71% to 88% settle before trial). Settlement means that the defendant is paying less than the full value of the social loss created by its actions. Gilles & Friedman, *supra* note 2, at 151 ("Indeed, the only time a defendant is forced to internalize costs that exceed the social costs of its actions is, we suspect, when a case goes to judgment, and punitive or tremble damages are imposed."). Where there exist opt-outs pursuing separate claims, the potential for full internalization comes closer to being realized.

3. Infrequency of Opt-Outs

A related rationale for a rule of lenity in the review of efforts to opt out is that very few class members make such an effort.[20] In an empirical study of opt-out rights undertaken by Professors Theodore Eisenberg and Geoffrey Miller, examining "several thousand class action decisions for the eleven-year period between 1993 and 2003," and generating "159 cases with qualitative information about the number of opt outs," the authors concluded that opt-outs are rare: fewer than 1% of all class members exercise their right to opt out of the class or proposed settlement.[21] Other studies have also revealed low opt-out rates.[22]

Further, the rate at which opt-outs actually commence separate litigation is likely even lower. This "is all the more

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20 As Debbie Hensler notes:

> If the loss is large and apparent to the individual consumer or business, that party may seek legal advice and, eventually, bring an individual lawsuit. But if the loss is small, it is less likely to be recognized by those affected, and it is less likely that anyone will come forward to claim compensation even if many individuals or businesses are affected by it.

21 Eisenberg & Miller, *supra* note 3, at 1532:

22 Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996) ("Across all four districts, the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total membership of the class; 75% of the opt-out cases had 1.2% or fewer of class members opt out."). *See also* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) (finding low opt-out rates in an examination of four class action cases).

significant since class members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are relieved of litigating often difficult class certification issues, and only have to prove their own damages."[23]

So where opt-outs do come forward seeking to commence separate litigation—whether because the opt-outs have different claims from the rest of the class, or wish to seek different types of relief, or simply hope to maximize their recovery—this can only improve the deterrent function of class action practice by maximizing the social costs that the wrongdoer must internalize. It is important to note, in this regard, that the claims of opt-outs are not simple "facsimiles of the class action claims": particularly relevant here are the "differences in liability attached to state court claims, speed at which state courts can ferry cases through the litigation pipelines and discovery advantages, augment the settlement value of opt-outs."[24]

4. Evidence that Opt-Outs Do Better than Class Members

The argument that encouraging opt-outs will maximize the deterrent value of class action litigation is based on the assumption that opt-outs will do well—perhaps even better—than class members. Much of the evidence that underlies this assumption is impressionistic and anecdotal. So, for example, Professors Eisenberg & Miller found that opt-out rates vary depending on the type of case, so that mass tort and

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23 Gilles & Friedman, *supra* note 2, at 130.

24 Eisenhofer at 591.

employment discrimination cases experience a higher rate of opt-outs. The authors assert that this is likely due to the fact that tort and employment claims tend to be high-value individual claims, where the claimant may have greater success at maximizing recovery by "going it alone," even through to trial.[25]

Recent commentary also indicates that institutional investors are increasingly choosing to opt out of securities class action settlements.[26] Specifically, "investors with large losses have sought to maximize their recoveries by opting out of the class action and pursuing independent claims." In the WorldCom litigation, for example, "close to 80 institutional investors opted out of the class litigation...[and] were tremendously successful and generated substantial premiums for the opt-out plaintiffs over the historic recovery achieved by the class litigation."[27] And this choice appears to be economically rational: "where institutional investors have publicly revealed the settlement outcomes of these opt-out suits, their recoveries appear to have exceeded that of the class plaintiffs."[28] Indeed, since the success of the WorldCom opt-outs, this strategy has "become increasingly popular among

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25 *Id.*

26 *See* Jay W. Eisenhofer, *Institutional Investors as Trend-Setters in Post-PSLRA Securities Litigation*, 744 PLI/Lit 579 (2006).

27 *Id.* at 590 ("For example, the Ohio Retirement Systems with total losses from stock and bond purchases of $500 million, garnered a $94 million settlement. The Alabama Retirement Systems, which sued a collection of WorldCom underwriters for its purchases of WorldCom bonds, recovered over $111 million, representing 86% of bond losses.").

28 *Id.*

institutional investors in cases of egregious fraud where investors have suffered large losses."[29]

Commentators assert that "the primary reason to opt out of securities class actions is the opportunity to obtain a larger and quicker recovery...[and that] it is clear from recent successes that institutional investors are able to command a premium over class settlements by opting out."[30]

CONCLUSION

There is no doubt that the right to opt-out triggers important concerns relating to constitutional due process and litigant autonomy, among others. However, in the real-world of contemporary class action litigation, opt-outs serve far more practical functions: they serve as a check on class counsel, as a thorn in the defendants' side, as notice to the judge about the adequacy of the settlement, and, as we have argued here, as an additional deterrent force. Because none of the main characters in the class action drama wish to share the spotlight with potential opt-outs, significant efforts are made to reduce the opportunity or ease of opting out of a settlement. As commentators note, "the present-day battle over opt-out rights involves settling defendants and plaintiffs' counsel seeking

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29 *Id.* at 590 ("In the Bristol Meyers securities litigation, five pension funds who opted out of the securities class action settled their claims with Bristol Meyers for $89 million. This was ten times the recovery they would have received had they participated in the class action...Recently, in the AOL-Time Warner securities litigation, Lerach Coughlin announced that it had amassed a collection of 100 institutional investors with collective losses of $1.5 billion to opt-out of the $2.6 billion class action settlement.").

30 *Id.*

mandatory certification on the one hand, and putative opt-out absentee-objectors challenging the settling parties' cram down efforts on the other."[31] In determining the victor in that battle, courts should consider the deterrent value that opt-outs bring, particularly in cases such as this where the opt-outs have filed separate litigation, do not effect the class settlement or "blow provision," and seek to press different legal theories. Upholding the procedural obstacles put in the way of opt-outs by those crafting the class settlement is, quite simply, a bad policy choice.

Respectfully submitted,

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[31] Wolfman & Morrison, *supra* note 17, at 732.

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No. 06-475

IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,

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ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF as *AMICI CURIAE*, BY BLUECROSS BLUESHIELD OF MASSACHUSETTS, BLUE CROSS AND BLUE SHIELD OF NEBRASKA, EXCELLUS HEALTH PLAN, INC., THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, AND HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY

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December 22, 2006

The Defendants-Respondents have objected to proposed *amici curiae's* motion for leave to file an amicus brief. The Defendants-Respondents state that they oppose the motion on the grounds that the proposed *amicus curiae's* disclosure required by Supreme Court Rule 37.1 is ambiguous or otherwise insufficient. The objection is groundless.

Nonetheless, in the interest of clarity and simplicity, counsel for the proposed *amici curiae* hereby certify again that no party, nor counsel for any party, has made a financial contribution to the proposed brief and that the entire cost of the brief is being paid by the *amici curiae* alone.

Further, the brief was authored in whole by the law firm of Bondurant Mixson & Elmore, LLP. While Bondurant, Mixson & Elmore, LLP, formerly represented the Petitioners before the Eleventh Circuit in this case, Bondurant, Mixson & Elmore does not now represent Petitioners or any other party to this action in this Court, and did not represent any party at the time it authored the brief on behalf of the proposed *amici curiae*.

Dated: December 22, 2006

Washington, D.C.

Respectfully submitted,

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